In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC.,
Appellant,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

JURISDICTIONAL STATEMENT
Of Bowman Transportation, Inc.

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November 5, 1975

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OPINIONS BELOW

This is an appeal from the Opinion and Judgment of a Three-Judge Court in the United States District Court, Western District of Arkansas, Fort Smith Division, dated and filed on September 2, 1975, copy of which Judgment and Order is attached to this Jurisdictional Statement as Appendix A, rendered on remand from the decision of the Supreme Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, decided Dec. 23, 1974, rehearing denied February 24, 1975. This and prior judicial proceedings involve review of the Report and Order of the Interstate Commerce Commission (ICC), served January 24, 1972, printed at 114 M.C.C. 571-796.

JURISDICTION

This case was remanded to the Three-Judge Court in the United States District Court, Western District of Arkansas, Fort Smith Division, by the Supreme Court for the limited consideration "of one issue", 42 L.Ed.2d 455.[1] That issue was specifically defined by the Supreme Court as follows (42 L.Ed.2d 463-464):

> "In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The 'excess' was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority."

Following remand, the Three-Judge District Court arrogated to itself an additional issue, not involved in this proceeding, whether

> Bowman may tack, join or combine the authority granted in this proceeding under Section 207 (49 U.S.C.A. § 307), 114 M.C.C. 571, to that authority acquired by Bowman in a separate proceeding under Section 5 (49 U.S.C.A. § 5), *Bowman Transportation, Inc.—Purchase (Part)—Alabama Highway Express, Inc.*, decided July 8, 1968 in MC-F-9921.

On September 2, 1975, the Three-Judge District Court entered an Order modifying and restricting the authority granted Bowman Transportation, Inc. (Bowman) by the ICC and judicially approved by this Court:

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1. On two occasions, the Supreme Court specifically noted that a *single* issue remains in the *Bowman* case. At 42 L.Ed.2d 455, where the Supreme Court stated the remand was "for consideration of one issue not reached by the District Court nor by this Court", and in 42 L.Ed.2d 463, where the Supreme Court added *"an issue remains"*.

> ". . . to preclude the tacking or joining of such authority with the authority acquired by Bowman Transportation, Inc., from the Alabama Highway Express, Inc., pursuant to the Commission's order of July 8, 1968, in No. MC-F-9921."

The referenced Alabama Highway Express, Inc. (AHE) rights were acquired by Bowman through purchase after hearings in the subject proceeding had been concluded and the case had been submitted to the Commission for an order. A copy of the Judgment and Order of the Three-Judge District Court is attached to this Jurisdictional Statement as Appendix A. Bowman filed its Notice of Appeal to the Supreme Court from the Judgment and Order of the District Court on September 22, 1975.

The jurisdiction of this Court to review the judgments of the District Court on direct appeal is conferred by 28 U.S.C.A. 1253 and 2101(b). *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 18 L.Ed.2d 847, 87 S.Ct. 1608, reh. den. 389 U.S. 889, 19 L.Ed.2d 197, 88 S.Ct. 11, 12; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 4 L.Ed.2d 1527, 80 S.Ct. 1570; *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409, 19 L.Ed.2d 639, 88 S.Ct. 539; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, dec. Dec. 23, 1974, reh. den. Feb. 24, 1975.

THE STATUTES INVOLVED

The statutes involved are set out in Appendix B attached. The principal statutes involved are Section 207 (a), The National Transportation Policy, preceding § 1, 49 U.S.C.A. § 307(a) and § 301 note.

THE QUESTIONS PRESENTED

The basic questions here involved are as follows:

1. Can a Three-Judge District Court modify a certificate granted a motor carrier by the ICC and judicially approved by the Supreme Court by ordering the ICC to impose a restriction against tacking the authority granted with authority subsequently purchased by the carrier with Commission approval?

2. Can a Three-Judge District Court, in a proceeding remanded by the Supreme Court for determination of a defined issue, use the remand to modify and restrict the grant of a motor carrier certificate by the ICC, judicially approved by the Supreme Court, by ordering the Commission to impose a restriction against tacking or joining the authority granted with authority subsequently acquired where the tacking issue was not involved, and the tacking restriction included rights never questioned?

STATEMENT

Or remand, the Three-Judge District Court substantially modified the certificate granted Bowman by the ICC and judicially approved by the Supreme Court by *ordering* the Commission to impose a restriction on the authority judicially approved to prohibit tacking the authority with that subsequently acquired through purchase by Bowman with Commission approval.

The factual background of this case and the purpose of the remand to the Three-Judge District Court is clearly and accurately stated in the prior decision of the Supreme

Court in this case. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al., supra.*

While the District Court expressed concern in its original decision "about the considerable lapse of time between the conclusion of the evidentiary hearings and the Commission's decision" 364 F.Supp. at 1261-1262, it here *ordered* the Commission to impose a restriction against tacking operating rights not acquired until a year *after* the hearings in this proceeding had closed and principally at the request of a carrier (Arkansas-Best Freight System, Inc. [ABF]) that did not acquire competing rights until *over three years after* the Bowman acquisition of the AHE rights.

It was the position of the United States, the ICC and Bowman, on remand, that the issue of tacking the authority granted under § 207 in the subject proceeding with the authority purchased by Bowman from AHE and approved by the Commission under §§ 5 and 212(b) was not involved, but the Three-Judge District Court "piggy-backed" this isue to that made the basis of the Federal Register (FR) republication and remand. The issue of tacking these separate grants of authority was first raised by ABF on March 27, 1972 in its Petition to Intervene in the Bowman Sub-No. 56 proceeding after it had previously withdrawn its protest and appearance during the hearings on June 15, 1967, and after it had acquired the operating rights of Youngblood Truck Line, Inc. effective October 14, 1971. The Commission denied the Petition for Intervention for the four reasons set out on page 6 of its Order of September 6, 1972, copy attached as Appendix C.

The right of a motor carrier to "tack" or join separate grants of authority are well established. A regular route certificate carries with it the right to tack unless there is a specific restriction in the certificate against such right.

Transport Corp. of Virginia, Extension—Maryland, 43 M.C.C. 716, 719 (1944); *M. J. O'Boyle & Son, Inc., Interpretation of Certificate,* 52 M.C.C. 248, 250; *Aero-Mayflower Transport Co., Inc.* v. *United States,* 95 F.Supp. 258, 262. The District Court ordered the Commission to disregard this well established rule and Commission policy and to modify the authority judicially approved by this Court to include a restriction affecting operating rights not acquired until over a year following conclusion of the hearings.

The pertinent dates to a consideration of this issue are as follows:

June 12, 1965 —Application filed by Bowman.

October 19, 1965 —Notice of Bowman application published in the FR, pages 10311-12.

March 21, 1966 —Hearings commenced on the consolidated applications.

June 15, 1967 —ABF withdrew its protest to the Bowman application.

August 24, 1967 —Hearings on consolidated applications concluded.

November 1, 1967—Notice of application, Bowman—Purchase (part)—AHE published in FR.

August 15, 1968 —Bowman—Purchase (part)—AHE application approved by Commission—MC-F-9921.

May 26, 1971 —Notice published in FR of application ABF—Control and Merger—Youngblood Truck Line, Inc. (Youngblood).

October 14, 1971 —Order approving application—ABF—Control and Merger—Youngblood.

January 24, 1972—Order of Commission approving Bowman Sub-No. 56 application (114 M.C.C. 571-796).

February 24, 1972—Notice of Bowman Sub-No. 56 republished in FR, pages 3935-3936.

March 27, 1972 —Petition of ABF to intervene in Bowman Sub-No. 56.

October 2, 1972 —Commission Order, served October 6, 1972, denying Petition to Intervene and for Rehearing.

After hearings were concluded in the subject Sub-No. 56 proceeding and while the consolidated cases were pending before the Commission, Bowman entered into a contract to purchase a part of the operating authority of AHE in Docket MC-F-9921. Almost *four years later*, the plaintiff, ABF, entered into a contract to acquire Youngblood under Docket MC-F-11179. The Bowman application was approved by the Commission on August 15, 1968. The ABF acquisition of Youngblood was approved *over three years later* on October 15, 1971. The Bowman purchase of AHE authorized an extension of its operating rights and service

> Between Birmingham, Alabama and points within a radius of 65 miles thereof, on the one hand, and, on the other, Louisville, Ky., points in Indiana and Tennessee and defined areas of Ohio, Illinois and Florida.

A map showing the area of this acquisition is attached as Appendix D. The ABF acquisition extended its authority into North Carolina, South Carolina, West Virginia, Kentucky and points in Ohio and Illinois. A copy of the map filed by ABF in its application to approve its acquisition of Youngblood is attached as Appendix E. The Youngblood operating rights were "tacked" by ABF to its authority to

provide through service. The Commission Order approving the Youngblood acquisition was silent on the question of tacking.

Obviously, the issue of ABF "tacking" its Youngblood acquisition and Bowman "tacking" its AHE authority were not involved in the subject proceeding because both acquisitions occurred long *after* the hearings were concluded in this case.

In its Petition for Leave to Intervene filed March 27, 1972, ABF states that:

> "Subsequent to the original proceedings in Sub 56, ABF acquired the operating rights of Youngblood Truck Line, Inc."

It might have added that its acquisition of Youngblood occurred *over four years after* hearings were concluded in this case and over *three years after* consummation of the Bowman purchase of a part of AHE. Thus, the Three-Judge District Court *retroactively* imposed a restriction on operating rights on the basis of an acquisition which admittedly occurred more than *three* years after the latest proceeding relating to Bowman.

A Motor Carrier Can Tack Separate Grants of Authority Providing There Is a Point of Service Common to Both and the Physical Operations Are Rendered Through Such Common Point

The right of a motor common carrier to "tack" or "combine" separate grants of authority is well established. The general rule, consistently followed by the Commission was clearly expressed in the early case of *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716, 719 (1944) as follows:

> "It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. Powell Bros. Truck Lines, Inc.—Purchase—Bryan, supra. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under section 207(a) of the act. Days Transfer, Inc.—Purchase—Haner, 39 M.C.C. 339; Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier irregular-route authorities, are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. Carolina Freight Carriers Corp.—Purchase—Edmunds, 36 M.C.C. 259, B. & E. Transp. Co., Inc.—Purchase—Merchants Transp., Inc., 36 M.C.C. 561; and Consolidated Freightways, Inc.—Purchase—Pacific I. Exp., 38 M.C.C. 577."

The no-tacking restriction imposed by the District Court would have the impractical and wasteful effect of requiring Bowman to interline freight with another carrier moving between its Sub-No. 56 authority, on the one hand, and, on the other, the Alabama Highway territory instead

of handling direct as it would be authorized to do absent such restriction which the District Court ordered the Commission to write into the certificate to be issued Bowman. Specifically, Bowman will hold authority under its Sub-No. 56 grant to originate shipments at Dallas, Texas, destined to Akron, Ohio. Absent the tacking restriction, Bowman can transport that freight from origin to destination by tacking the two separate grants of authority at Birmingham, Alabama. The tacking restriction would require Bowman to interline that traffic with another carrier at Birmingham for transportation by the other carrier to Akron, or another carrier would have to originate the shipment at Dallas, transport it to Birmingham and interline it to Bowman which would then transport the shipment to Akron. The shipment, in either event, would move through interline service which was the subject of major complaints in this record leading to approval of the applications. Additionally, the unit transporting the freight from Dallas to Birmingham or from Birmingham to Akron may move over the highway alongside a unit of Bowman, traveling over the identical route, at the same time. That is the wasteful and unreasonable situation which the Commission's tacking policy avoids as an essential part of the National Transportation Policy.

The Three-Judge Court imposed restriction, without Commission review, would freeze into the authority granted and approved by this Court operating deficiencies which the Commission was endeavoring to eliminate in the grants, including carrier imposed tariff restrictions, delays incident to interline and multiple handling of shipments.

Equally persuasive of the issue here involved are acquisitions and extension of Johnson Motor Lines, Inc. and Jones Truck Line, Inc., two of the other successful applicants in this consolidated proceeding. All dates relative to the Bowman Sub-No. 56 application, above noted, were applicable to the Johnson Sub-No. 18 application. On October 18, 1968, in MC-F-1009, Johnson acquired the rights of Richards Freight Lines, Inc.[2] The certificate was issued on July 9, 1971, and Johnson now performs single-line service via the Atlanta and New Orleans gateways between points in the Richards authority and points on its Sub-No. 18 rights. Additionally, on December 18, 1972, Johnson filed its Sub-No. 34 application which was granted on February 28, 1974, authorizing specific commodity authority from Wayne County, North Carolina, to ten states. Johnson is now tacking that authority to perform service from its Sub-No. 34 origin points to its Sub-No. 18 territory. A map of the Johnson authority granted in its Sub-No. 18 consolidated application with subsequently acquired authority is attached as Appendix F.

Likewise, Jones, which also received a grant in the consolidated proceedings, acquired additional authority through the purchase of M-X Express (MC-F-11516) during the pendency of the consolidated application and is today operating those additional rights with the authority received in its Sub-No. 67 application.

Hundreds of additional instances can be cited to illustrate and emphasize that

> Where a carrier holds two separate grants of authority which have a point common to both the carrier can join or track the separate grants to provide a through service.

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2. Authorizing service to Scranton, Pa., Atlantic City, N.J., Harrisburg and Erie, Pa., New York City, Glens Falls, Oswego, Rochester and Buffalo, N.Y.

In *Chemical Tank Lines—Control and Merger*, 87 M.C.C. 333, 338, the Commission emphasized that:

> "Generally, restrictions on operating rights create undesirable problems of interpretation and operating complications and should not be imposed except where the record conclusively shows that they are necessary in the public interest."

If AHE had retained its certificate until the Sub-No. 56 authority was issued, AHE and Bowman could have established through service and joint rates between the Sub-No. 56 territory and the AHE territory. If they had not done so "the Commission in the interest of coordinating the National Transportation Policy could have required that be done". See *Century-Matthews Motor Freight* v. *Thrun* (1949, 8 CCA), 173 F.2d 454, 457. In *Cooper Transfer Co., Inc. Ext.—Jacksonville, Fla.*, 115 M.C.C. 324, Cooper filed an application seeking to extend its existing authority between (1) Jacksonville, Florida and Thomasville, Georgia over a described route, and (2) between Jacksonville, Florida and the junction of Interstate Highway 10 and U.S. Highway 19, over Interstate Highway 10, serving no intermediate points, at which latter point it would tack with its existing authority over a far reaching regular route system extending between Thomasville and numerous points in the States of Florida, Georgia, Alabama and Louisiana, including Pensacola, Florida, Mobile, Alabama and New Orleans, Louisiana. In that case, the Commission stated:

> "In an application proceeding of this type, the authority being granted will not be restricted against tacking with the applicant's existing operating rights, notwithstanding that no specific public need has been shown for such overhead operations, unless protesting carriers conclusively demonstrate that their operations would otherwise be materially adversely affected. See Eldon Miller, Inc.—Ext.—Liquefied Chemicals, 73 M.C.C. 538, 540, and Rawlings, Ext.—Emporia, 76 M.C.C. 636, 637."

As noted, Bowman's acquisition of part of the AHE rights was approved by the Commission over fourteen months after conclusion of all hearings in the subject proceeding. Notice of intent to tack the AHE authority obviously could not have been included in the Sub-No. 56 application which was filed and noted over three years before the AHE application. It was included in all pleadings filed after the acquisition and one of the original plaintiffs in this proceeding, Braswell Freight Lines, Inc.[3] protested the purchase application on the sole bases that "Bowman would not have to interline traffic" such as Braswell was then doing from Chicago.

In *Dallas & Mavis Forwarding Co., Inc. Ext.*, 84 M.C.C. 731, the Commission considered a case closely analogous to the issue here involved. There, a protestant urged that the Commission should restrict the authority sought against tacking with subsequently acquired authority, pointing out that the applicant had a Section 5 purchase application pending. Likewise, in the case here pending, Bowman subsequently acquired a part of the operating authority of AHE. In the *Dallas & Mavis case*, the Commission refused to impose the restriction, stating:

> "Although a protestant contends that we should impose a restriction against tacking which is also appli-

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3. Braswell, like 7 other original plaintiffs, withdrew. See *West Brothers Extension*, 98 M.C.C. 572, 574: "This withdrawal of protests and opposition is an indication that existing motor carriers do not expect to suffer any material detriment from a grant of the authority sought."

cable to authority hereafter acquired by the respective applicants, we do not agree. Rather, we believe that the issue should properly be decided at the time and in the proceeding involving the acquisition of such additional authority. Compare T. T. Brooks Trucking Co., Inc., Conversion Application, 81 M.C.C. 561, 573."

It is the general policy and practice of the Commission to refuse to impose tacking restrictions.

The rule against imposing a tacking restriction has been so firmly established and uniformly applied that the Commission has refused to impose such a restriction even where the applicants, as a result of stipulations with protestants, have agreed to accept such restrictions.

In *Convoy Co.* v. *United States,* 200 F.Supp. 10, 13, the Court stated:

"The Commission's conclusion that restriction of authority granted against interline movements or tacking was not warranted, being supported by the record, the fact that there was no direct evidence introduced to show the need for interline service for the combining of applicant's existing authority with that granted would not require the Commission to issue tacking or interline restrictions in the order. The Commission's findings should be assigned the respect due to judgments of a tribunal appointed by law and informed by experience."

The Right of Tacking Is a Matter for the Commission and Its Decision Thereon Will Not Be Disturbed by the Courts Unless It Is Wrong As a Matter of Law

In *Wilson* v. *United States,* 114 F.Supp. 814, 821, the Three-Judge Court stated:

> *"The right of 'tacking' authority is a matter wholly within the competence of the Interstate Commerce Commission and its resolution of such a right will not be disturbed unless it is established as being misapplied as a matter of law."* (Emphasis supplied).

Here, the judgment of the Three-Judge District Court, ordering the Commission to impose a no-tacking restriction

—Ignores the basic rule uniformly applied by the Commission and the courts that a carrier normally can tack any granted authority with that which it already holds, or with that subsequently acquired.

—Imposed a restriction which the Commission did not do in this proceeding or in the AHE purchase case.

—Destroyed a property right of Bowman in the AHE authority, notice of which was duly published in the FR during the pendency of this proceeding.

—Applied one rule to Bowman and another to Jones, Johnson and ABF, each of which is tacking subsequently acquired authority.

The Restriction Ordered by the District Court Exceeded the Area Involved and That Requested by the Plaintiffs

The judgment of the District Court *ordering* the Commission to impose a restriction "to preclude the tacking or

joining" of the Sub-No. 56 authority, here involved, with the subsequently acquired authority by Bowman from AHE is broader than that sought by the plaintiffs or considered by the District Court. There is a complete dichotomy and variance between the issue considered by the District Court and its order. In its opinion, the District Court stated (p. 12):

> ". . . ABF prayed that the Commission restrict the authority granted to Bowman to preclude the handling of traffic between the points on routes in Sub 56 on the one hand and on the other to all points and places in the States of Illinois, Indiana and Ohio.
>
> . . . The 'previously granted' authority did not authorize Bowman to operate in the States of Ohio, Indiana and Illinois. . . .
>
> Defendants have argued that plaintiffs should have protected their interests by opposing Bowman's application to purchase from Alabama Highway Express authority to operate in the States of Ohio, Indiana and Illinois."

And on page 10 of its Order, the District Court further stated:

> "By virtue of this purchase Bowman was authorized to serve points in Indiana, Tennessee, Illinois and Ohio.
>
> . . . Shown in green (Bowman map, Appendix D) is the area acquired from Alabama Highway Express situated in the States of Indiana and Illinois.
>
> A comparison of the ABF map with the Bowman map shows that now as a result of the grant in Sub 56 Bowman can handle traffic originating and destined

> to the States of Texas, Louisiana, Mississippi and Arkansas on the one hand, and parts of Illinois, all of Ohio, and all of Indiana on the other."

It appears that the District Court intended to order the restriction imposed against the movement of traffic between the subject Sub-No. 56 proceeding, on the one hand, and, on the other, the Bowman authority in "Ohio, Indiana and Illinois" which was subsequently acquired by purchase from AHE. However, the Order of the Court went much further and beyond any issue raised or considered by the District Court, because the authority acquired by Bowman from AHE included additional rights in Tennessee and a defined part of Florida which the District Court ordered to be restricted. No issue was raised with respect to these states and the District Court never considered them. The record in this case clearly shows the authority which Bowman acquired. In the Recommended Report and Order of the Examiners, served November 19, 1969, they noted (Sheet 25):

> "NOTE: In August 1968 Bowman acquired a portion of the operating rights of Alabama Highway Express which included among other authority the transportation of general commodities (with exceptions) between Birmingham and points in Alabama within 65 miles of Birmingham, on the one hand, and, on the other, Louisville, Ky., and points in Indiana, Tennessee, and portions of Florida, Illinois, and Ohio. No. MC-F-9921, *Bowman Transportation, Inc.—Purchase (Portion)—Alabama Highway Express, Inc.* (not printed), decided July 8, 1968."

In the Bowman brief to the District Court, it was carefully noted that the Bowman purchase of AHE authorized an extension of its operating rights and service:

"Between Birmingham, Alabama and points within a radius of 65 miles thereof, on the one hand, and, on the other, Louisville, Ky., points in Indiana and Tennessee and defined areas of Ohio, Illinois and Florida."

As noted by the District Court, the objections to tacking the Sub-No. 56 grant and the AHE purchase were directed to Indiana and described parts of Ohio and Illinois, but the Judgment of the District Court went far beyond the objections and issues and *ordered* the Commission to restrict *all* the authority acquired by Bowman from AHE, including Tennessee and a defined part of Florida which was not involved or questioned.

This illustrates the judicial danger of deciding an issue not involved in this proceeding since that transaction occurred *after* hearings in this case were closed and the acquisition of Youngblood by ABF occurred over four years after the hearings in this case were concluded.

The District Court Order further emphasized the hazard of extending a limited remand order to "piggyback" a sweeping restriction which emasculates a uniform rule and policy of the Commission. It should not be allowed to stand.

CONCLUSION

Probable jurisdiction should be noted and the order directing the Commission to impose a restriction on the grant of authority which the Court previously approved should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of the Supreme Court of the United States, I have served a copy of the foregoing Jurisdictional Statement upon all attorneys of record by mailing copies to them, first class mail, postage prepaid, and on all parties more than 500 miles distant* by air mail, postage prepaid, to the addresses shown by them in pleadings filed, as follows:

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This 5th day of November, 1975.

/s/ MAURICE F. BISHOP

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. FS-72-C-65

ARKANSAS-BEST FREIGHT SYSTEM, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

BOWMAN TRANSPORTATION, Inc.,
Intervening Defendant.

JUDGMENT

(Filed September 2, 1975)

The questions at issue as stated by the Supreme Court of the United States in its opinion of December 23, 1974, its mandate certified February 28, 1975, filed herein March 3, 1975, together with the pertinent record, the briefs and oral argument of counsel for the parties, having been fully considered and determined as set forth in the opinion of the court filed herein,

IT IS ORDERED AND ADJUDGED in accordance therewith that Bowman Transportation, Inc., is granted only the excess authority for which the Commission found

from legal and competent evidence a public need existed; and that the portion of the Commission's order that was not supported by any evidence of a public need and in regard to which there was no finding of any public need will be and the same is set aside and held for naught.

IT IS FURTHER ORDERED AND ADJUDGED that the order of this court of March 25, 1975, be modified so as to authorize the Commission to issue a certificate of public convenience and necessity to Bowman Transportation, Inc., as hereinbefore set forth with a modification restricting such authority to preclude the tacking or joining of such authority with the authority acquired by Bowman Transportation, Inc., from the Alabama Highway Express, Inc., pursuant to the Commission's order of July 8, 1968, in No. MC-F-9921.

This 2 day of September, 1975.

/s/ J. Smith Henley
Judge, United States Circuit Court

/s/ Paul X Williams
Judge, United States District Court

/s/ John E. Miller
Sr. Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. FS-72-C-65

ARKANSAS-BEST FREIGHT SYSTEM, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

BOWMAN TRANSPORTATION, Inc.,
Intervening Defendant.

Before HENLEY, Circuit Judge, WILLIAMS, Chief District Judge, and MILLER, Senior District Judge.

MILLER, Senior District Judge

OPINION ON REMAND

(Filed September 2, 1975)

Involved in the prior decision of September 11, 1973, of this court, 364 F.Supp. 1239, was the review of orders of the Interstate Commerce Commission ("the Commission") granting certificates of public convenience and necessity to Red Ball Motor Freight, Inc., Johnson Motor Lines, Inc., and Bowman Transportation, Inc. (Bowman). The Commission authorized the named carriers to extend their operations as common carriers of property over specified routes in the southeastern and southwestern portions of the United States.

On November 7, 1972, this court entered an order temporarily restraining the Commission from issuing certificates of public convenience and necessity pending final

hearing and determination of the action. Arkansas-Best Freight System v. United States, (W.D.Ark. 1972) 350 F.Supp. 539. The court at page 546 said:

> "The plaintiffs have shown that without a stay they will suffer irreparable injury. If the Certificates of Public Convenience and Necessity are issued to Red Ball, Bowman and Johnson under the authority granted in the orders questioned in this proceeding, those carriers will immediately proceed to provide service to the public in accordance with the provisions of the orders. This will necessarily cause a diversion from plaintiffs of substantial volume of traffic which they are now handling and revenue derived therefrom and inflict an irreparable injury on the business of the plaintiffs which can never be recouped even if they should prevail on the merits of the action."

In due time the case was fully briefed and orally argued. On September 11, 1973, the court filed its opinion holding that the orders of the Commission extending the operations of Red Ball, Johnson and Bowman were invalid and enjoined the enforcement thereof. 364 F.Supp. 1239.

On appeal, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447, the Supreme Court on December 23, 1974, reversed and remanded. Rehearing denied February 24, 1975.

The Court upheld the Commission's grant of certificates to Red Ball and Johnson. It also upheld the grant of a certificate to Bowman insofar as it involved authority embraced within its application, but remanded for our further consideration the issue involving the Commission's grant of authority to Bowman that "exceeded that set forth in Bowman's application.

Relative thereto, the Supreme Court in Section V of its opinion stated:

> "Our opinion disposes of appellees' objections to the Commission's order insofar as it granted the applications of Johnson and Red Ball. As to appellant Bowman, however, an issue remains. In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The 'excess' was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority. Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications.
>
> "While we have on occasion decided residual issues in the interest of an expeditious conclusion of protracted litigation, see Consolo v. FMC, 383 &.S. 607, 621, we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand.

"We hasten to add, however, that our remand provides no basis for depriving Bowman of authority conferred by the Commission that was within its original application."

On March 5, 1975, this court in accordance with the mandate of the Supreme Court entered an order dissolving the injunction previously entered enjoining the issuance of the certificates of public convenience and necessity to Johnson and Red Ball.

On March 25, 1975, the court considered paragraph V of the opinion of the Supreme Court, and entered the following order:

"IT IS ORDERED, THAT, pursuant to the decision and mandate of the Supreme Court of the United States in 73-1055, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., et al., the permanent injunction previously rendered by this Court enjoining the issuance of a certificate of public convenience and necessity to Bowman Transportation, Inc. be and is hereby modified and partially dissolved to permit the issuance of a certificate of public convenience and necessity conforming to the Order of the Interstate Commerce Commission in Herrin Transportation Co., Extension—Atlanta, Georgia, 114 M.C.C. 571, except that said authority shall pending judicial determination of the issues specifically preclude the tacking, joining or combining of said authority granted in 114 M.C.C. 571 to that authority granted in Bowman Transportation Inc.—Purchase (Part)—Alabama Highway Express, Inc., decided July 8, 1968 in No. MC-F-9921, and shall further be restricted so as to preclude any authorization in said authority for service by Bowman Transporation, Inc. of the junction of U. S. Highways 11 and 80 and Interstate Highway 59 at or near Toomsuba, Mississippi for any purpose or the including of Montgomery, Alabama in the restrictive language.

"IT IS FURTHER ORDERED, THAT, this Court shall retain jurisdiction of this matter for the purpose of determining the issues of whether or not the authority granted in 114 M.C.C. 571 shall be permanently restricted to preclude the tacking, joining or combining of said authority granted in Bowman Transportation, Inc.—Purchase (Part)—Alabama Highway Express, Inc., decided July 8, 1968 in No. MC-F-9921, and shall further be restricted so as to preclude any authorization in said authority for service by Bowman Transportation, Inc. of the junction of U. S. Highways 11 and 80 and Interstate Highway 59 at or near Toomsuba, Mississippi for any purpose or the including of Montgomery, Alabama in the restrictive language.

"This Court also retains jurisdiction on issues relating to the costs taxed by the Supreme Court."

All adjudicated costs have been paid by plaintiffs.

The Bowman application is thus before the court for review on the limited issue set forth in the order of remand.

All parties have filed extensive briefs and orally argued their contentions, all of which together with applicable portions of the pleadings have been carefully considered by the court.

Counsel for the United States and Bowman state that the limited issue involves the question "Whether the Commission's grant of authority greater than that initially proposed by a motor carrier applicant after finding a public need therefore and after republication of the enlarged grant and consideration of objections thereto is lawful and cor-

rect." They also contend that this court should limit its consideration to only one portion of the authority granted by the Commission that exceeded the authority requested in the application. This court does not agree that its review is so limited. It is only necessary to read and keep in mind what the Supreme Court said in section V of its opinion as hereinbefore set forth in full.

The plaintiffs[1] contend that the grant to Bowman clearly and materially exceeded the authority that it described and set forth in its application.

At the beginning of the hearing Bowman proposed an amendment to its application which reduced rather than enlarged the scope of its application. The amendment was accepted by plaintiffs and approved by the Commission.

In considering the issue as stated by the Supreme Court in its remand, we have given careful consideration to the principles discussed and applied by the Supreme Court in its review of this court's prior decision. We have endeavored to give to the Commission's order every possible presumption of correctness and to resolve every ambiguity in a way that would support the conclusions of the agency.[2]

In this court's opinion of September 11, 1973, the court, beginning at page 1258 of 364 F.Supp. said:

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1. In addition to Arkansas-Best Freight System, Inc., the following plaintiffs, ET&WNC Transportation Co., Gordons Transports, Inc., Mercury Motors Inc., Red Line Transfer and Storage Co., Inc., T.I.M.E.-DC, Inc., Transcon Lines, Yellow Freight System, Inc., and the intervening plaintiff, Jack Cole-Dixie Highway Co., served and submitted briefs to the Commission in the various proceedings that affected their business.

2. At the time of the court's original decisions, Sept. 11 and Oct. 4, 1973, Circuit Judge Mehaffy was a member of the court. Following his retirement, Circuit Judge Henley was duly appointed to succeed Judge Mehaffy.

"The grant to Bowman, exceeding the scope of its application, was described in a Federal Register notice affording interested parties an opportunity to petition for reopening or reconsideration of that application. Several carriers, including ABF, filed timely petitions in response to the notice, based upon their interests in the Bowman grant, seeking reopening or reconsideration of the Division decision. These petitions pointed out that, while the application was pending, Bowman acquired extensive new authority, and the approved grant failed to contain any restriction preventing Bowman from performing service between points in this newly-acquired territory and points within its new grant. Since the original notice of the Bowman application specifically described its proposal to join its *then existing* authority with that sought, petitioners sought an opportunity to demonstrate the need for a modification or denial of the Bowman grant. These petitions were considered along with numerous petitions seeking reconsideration of the Division order. A total of 32 separate groups of petitions and replies thereto, some exceedingly comprehensive, were denied by a two-to-one vote of the same Division twelve working days after the last pleading was filed. (See Exhibit 5 to Complaint.)"

At page 1263 the court further stated:

> "The Division's rejection of the petition of ABF and others, seeking reopening and reconsideration of the Bowman application, does not appear compatible with the Federal Register notices describing such application. * * * The additional publication of the Bowman grant was thereby treated as a meaningless formality."

The above findings of this court are correct and based upon the undisputed facts disclosed by the entire record.

In the joint brief of the USA and the Commission the defendants contend that the Commission's decision to grant Bowman "excess" authority by including Montgomery in the gateway restriction subject to the condition precedent of republication in the Federal Register is lawful and correct; that as a matter of law republication in the Federal Register prior to the issuance of a certificate of public convenience and necessity, to advise interested parties that the Commission, upon finding a public need therefor, intends to grant authority beyond that originally noticed in the Federal Register, satisfies all notice and due process requirements, and that as a question of fact the republication of the Federal Register notice to reflect the Commission's grant of authority to Bowman to serve Montgomery, Ala., as a gateway was natural and correct, and the issue of whether Bowman may tack the certificates obtained in the instant proceeding with those purchased from Alabama Express is not properly before the court.

Counsel for defendants have called the court's attention to the testimony of several witnesses that described the movement of freight to and from Montgomery. This testimony was proffered primarily in support of some other carriers whose applications were heard on the consolidated record and was not specifically presented in support of any proposal by Bowman to serve Montgomery or to utilize the Montgomery gateway. The record shows the Bowman clearly explained at the outset of the hearing that it did not seek such authority in reference to Montgomery, and this proffered testimony would have been irrelevant to any issue presented by the application. However, in a proceeding of this type the Commission may properly consider all

evidence of record regardless of which applicant was responsible for the presentation of such evidence.

(1) The Commission granted excess authority to Bowman to serve points on the Montgomery route and to use Montgomery as a gateway, and (2) it failed to include in its restrictions a provision that would prevent Bowman from joining newly acquired authority with the authority acquired by Bowman subsequent to the hearing herein by purchase from Alabama Highway Express.

This court has concluded that by giving to the Commission's finding every possible presumption of correctness and by interpreting the findings in the light most favorable to the Commission, it can uphold the Commission's grant described as in (1) above, but not that described as (2). This conclusion is reached upon the fact that the Commission found "since the need has been shown for the use of this gateway, these defects will be cured subject to prior publication in the Federal Register." 114 M.C.C. at pages 611-12.

We now come to a consideration of the contention that Bowman may tack the authority obtained in the instant proceeding with that purchased from Alabama Highway Express. The defendants contend that the question is not before this court and that the plaintiffs are attempting to broaden the issue which was defined by the Supreme Court in its order of remand.

In the order remanding the case, the court, after stating that the issue remains as to applicant Bowman, stated:

> "In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The 'excess' was granted, subject to a condition precedent of pub-

lication in the Federal Register of Bowman's request for the excess authority. * * * and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications."

The court further said:

"We hasten to add, however, that our remand provides no basis for depriving Bowman of authority conferred by the Commission that was within its original application."

As stated by the Supreme Court, this court did not determine the question now before us in its former opinion. The court examined the record to a certain extent and made certain findings of fact but did not state any conclusion on the particular question now before the court. In its consideration the court said:

"Unless restricted voluntarily or by order of the ICC, a carrier normally can tack newly granted authority with that which it already holds, or with that subsequently acquired. Bowman limited its intention to tack the authority sought in the present proceeding to its then existing authority by the use of the following language as published in the Federal Register of Thursday, August 19, 1965, by stating '* * * with that authority previously granted * * * wherein applicant is authorized to serve points in * * *' and named sixteen (16) states and the District of Columbia. The States of Illinois, Indiana and Ohio were not named in the Federal Register publication. The published language constitutes a specific limitation regarding tacking which did not give notice to the public of any intention to tack the authority sought in the present

proceedings to authority subsequently acquired. Subsequent to the publishing of the 'Notice,' Bowman acquired Alabama Highway Express which allowed Bowman to serve points in Indiana, Illinois and Ohio. The grant of the authority in the present proceeding by the Commission, Division I, did not contain the limitation against tacking of the authority acquired in the present proceeding."

Most of the plaintiffs filed a petition similar to that of ABF for leave to intervene, to reopen and receive additional evidence, to reconsider and reverse the decision of Division I, on both the question of the use of Montgomery as a gateway and the tacking of the authority obtained in this proceeding, Sub 56, and authority that might be, or is, subsequently obtained.

Bowman filed its application for authority on June 12, 1965, in Docket MC 94201, Sub-nom 56. The initial notice was published in the Federal Register August 19, 1965. Division I on December 30, 1971, found, as evidenced by order served January 24, 1972, that present and future convenience and necessity required operation by Bowman as a common carrier of general commodities, with the usual exceptions, over certain designated routes. The republication of the revised notice appeared on February 24, 1972, at pp. 3935-36 of the Federal Register. In the republication of the notice the following statement appears:

"Because it is possible that other persons who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the findings in this order, a notice of the authority actually granted to applicant will be published in the Federal Register and issuance of a certificate in this

proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file a petition to reopen or for other appropriate leave setting forth in detail the precise manner in which it has been so prejudiced."

On November 1, 1967, Bowman caused to be published in Docket MC-F-9921 its notice for authority to purchase the operating rights of Alabama Highway Express. The purchase was consummated sometime in the month of October 1968. By virtue of this purchase Bowman was authorized to serve points in Indiana, Tennessee, Illinois and Ohio.

Bowman attached to its brief filed herein July 7, 1975, a map which shows in yellow the authority possessed by it prior to the beginning of the instant proceeding. In black is shown the Sub 56 authority acquired in the present proceeding. Shown in green is the area acquired from Alabama Highway Express situated in the States of Indiana and Illinois.

A comparison of the ABF map with the Bowman map shows that now as a result of the grant in Sub 56 Bowman can handle traffic originating and destined to the States of Texas, Louisiana, Mississippi and Arkansas on the one hand, and parts of Illinois, all of Ohio, and all of Indiana on the other.

It will be readily noted that the granting of the tacking privilege to Bowman would enable it to transport commodities in direct competition with ABF and other carriers as to points above mentioned by new authority not heretofore existing, and thus subject ABF in particular to competition by diverting from it traffic which is necessary to enable it to properly maintain and render adequate service to the public. The authority granted Bowman in Sub 56 directly conflicts with the authority held by ABF and other protestants as described opposite the granting numbered paragraphs in the Federal Register.

The plaintiff ABF, pursuant to certificate of convenience and necessity MC-29910 and subs thereof, was and is operating in and between the States of Arkansas, Louisiana, Pennsylvania, Texas, Mississippi, New York, Tennessee, Kentucky, Oklahoma, Kansas, Missouri, Iowa, Wisconsin, Indiana, Ohio, Georgia, North Carolina and South Carolina. During the time the original and substituted applications were before the Commission ABF owned and operated a total of at least 559 road tractors and 918 road trailers, and in addition owned and operated 797 units of city pickup and delivery vehicles.

In the petition to reopen the proceedings ABF and the other plaintiffs alleged that ABF was prepared to demonstrate to the Commission that as a result of the grant of authority in Sub 56 as republished over fifty percent of its tonnage and revenues would be subject to diversion, and that the Commission did not understand that the grant of Sub 56 to Bowman would authorize service that was not and could not have been contemplated at the time evidence was introduced during the hearings on the application; that by virtue of its acquisition subsequent to the taking of the testimony in Sub 56, Bowman would be granted excess authority without having introduced any evidence of public convenience and necessity.

In support of the petition to reopen the protestants contended that because of the material change in the republication of the notice that the Commission should reopen the matter and that Bowman should be required to prove by competent evidence establishing a public convenience and necessity to authorize operations which are

in conflict with the operations described in the original notice and the other protesting carriers as shown in the entire record.

In the alternative, ABF prayed that the Commission restrict the authority granted to Bowman to preclude the handling of traffic between the points on routes in Sub 56 on the one hand and on the other to all points and places in the States of Illinois, Indiana and Ohio.

In the prior opinion of this court we commented only on the terminology used in the Federal Register notice setting forth the scope of the application. The "previously granted" authority did not authorize Bowman to operate in the States of Ohio, Indiana and Illinois. On remand we have examined the question in more detail. There is nothing ambiguous in the application or in the notice describing the proposal.

Defendants have argued that plaintiffs should have protected their interests by opposing Bowman's application to purchase from Alabama Highway Express authority to operate in the States of Ohio, Indiana and Illinois. The contention is without merit and is completely answered by the record and especially by a comparison of the publication of the original notice and the republication.[3]

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3. During the preparation of this opinion, the writer, by letter of August 19, requested counsel for the parties "to supply me immediately with the title of each decision cited by them in the oral argument with the exception, of course, of the decisions that are listed and set forth in the briefs." The attorney for Bowman, Mr. Bishop, referred us to the following: Cedar Rapids Steel Transportation, Inc. v. ICC, 391 F.Supp. 181 (1975); Midwest Coast Transport, Inc. v. United States, 391 F.Supp. 1209 (1975); Baltimore and Ohio Railroad Co. v. United States, 391 F.Supp. 249 (1975); American Federation of Labor, etc., et al. v. Brennan, 390 F.Supp. 972 (1975); Nader v. Sawhill, 514 F.2d 1064 (1975); Cross v. United States, 512 F.2d 1212 (1975).

The plaintiff referred us to the decisions which we approve and discuss in our opinion.

We can find no way in which judicial approval can be given to the Commission's grant of the excess tacking authority. The requisites for a lawful grant of authority greater than that proposed in the application are (1) a finding supported by substantial evidence of a public need therefor; (2) republication of the enlarged grant so as to afford interested parties adequate notice thereof; and (3) consideration of objections thereto following republication. The absence of the establishment of each of the requisites results in depriving the person or corporation of due process.

Plaintiffs and any other interested parties were entitled to rely on the representations contained in the application. Baggett Transportation Co. v. United States, (N.D.Ala. 1962) 206 F.Supp. 835; Eagle Motor Lines, Inc. v. United States (N.D.Ala. 1971) 331 F.Supp. 80. In the latter case the court at page 82 said:

> "Terse excerpts from the specially concurring opinion of Judge Rives in Baggett Transportation Co. v. United States, 206 F.Supp. 835 (N.D.Ala. 1962) quoted in the margin,[5] while appearing in a somewhat different context, have a peculiar pertinency here.
>
> "Failure adequately to warn competing carriers of the authority actually sought and intended to be used, albeit by tacking, naturally has an injurious impact upon the integrity of the administrative process."

The note 5 referred to states:

> "5. 'The Commission must be able to rely upon the representations of the parties * * *,' and
>
> " 'However, when Baggett made its application for the transfer with the representations contained in that application, it became bound to them.' "

In Georgia-Florida-Alabama Transportation Co. v. United States, (M.D.Ala. 1968) 290 F.Supp. 764, the Commission granted authority to the defendant M.R.&R. which it did not seek in its application. In the original application and of which notice appeared in the Federal Register it sought authority to transport general commodities with exceptions between Mobile, Alabama, and Pensacola, Florida, serving no intermediate points.

At page 765 the court said:

> "The plaintiffs protested. At the outset of the hearing M.R. & R. amended its application by stipulation with the protestants with these remarks:
>
> " 'Mr. Examiner, at this point the Applicant will offer an amendment to the application in the nature of a restriction which we deem will reduce the scope of it and which incorporates some restrictions already existing and the restrictions we offer at this time are in these words: "Authority sought to be restricted against traffic moving in direct or interline service (1) Mobile and Pensacola; (2) Mobile and Jacksonville and (3) Mobile and Atlanta."
>
> " 'If I may, by way of explanation say this: the original restriction that we had proposed with respect to between Mobile and Pensacola and Mobile and Jacksonville as appeared in the notice was intended by us to cover all traffic whether it was direct or interline. In other words, Applicant didn't propose any service between these two points, that is, between Mobile and Pensacola and Mobile and Jacksonville. Now, what we have done, we have added another one between Mobile and Atlanta, another restriction and made it clear that the service proposed will not encompass any service on the

> shipments directly between the two points or interline at the two points.' "

At page 766 the court said:

> "The I.C.C. subsequently, and without giving notice to the protestants, to the public, or any further notice in the Federal Register, removed the stipulated restrictions which had been accepted and honored by the Hearing Examiner.
>
> "The plaintiffs contend that the grant of authority by the I.C.C. in excess of that sought contrary to the stipulation and amendment under these circumstances is error.
>
> "The defendants contend the I.C.C. may grant authority to a motor carrier broader than that requested by the carrier without notice to protestants or the public or without republication in the Federal Register."
>
> * * *
>
> "The I.C.C. has differentiated between a grant of authority between two terminals without tacking and the grant of authority between terminals which tack and has indicated such tacking constitutes a grant in and of itself as different and separate, a grant distinct from a grant where tacking does not occur. *'Our failure to impose a restriction to prevent tacking* (Emphasis added.) with the other authority previously held by applicant would have *exactly the same effect as a grant* (Emphasis added.), therefore, we will impose a restriction against tacking.' Tompkins Motor Lines, Inc.—Extension—Louisville, 95 M.C.C. 472, 481.
>
> "To state it another way, where tacking occurs on a new grant, two grants actually take place: (1) a grant

of authority between the two terminals and (2) a grant of authority from a new terminal to all the other areas brought into being by the tacking to a terminal which the applicant already serves under a previous grant. A much graver situation comes into being where tacking occurs, and no restrictions are made against interlining. In this case, by reason of the removal of the restrictions contained in the application, the gateways have been opened both east to west, Atlanta and Jacksonville to Mobile, and west to east, Mobile to Atlanta and Jacksonville, involving numerous competing carriers. Thus, the additional grant by reason of tacking and the removal of the restriction constitutes a grant not contemplated by the application which could adversely and materially affect the operation of other authorized carriers. The I.C.C. has noted the seriousness of such circumstances:

"'In appropriate circumstances restrictions against interline and tacking at origin and/or destination points have been imposed. These instances evolve when grants of authority are tied closer to the applicants existing operations and where tacking and interchange would result in additional competitive operations which are not contemplated and which *would adversely and materially affect* the operation of other authorized carriers. Riss and Co., Inc., Ext—Dakota County, Nebr., 102 M.C.C. 336, 343. On occasion, the service restriction may also be allowed for such *compelling reasons* as the agreement of the parties that protestants would be *materially and adversely* affected by their omission. No. MC-61755 (Sub-No. 20), Northern Haulers, Corporation Extension—St. Lawrence County, N.Y.' (Emphasis added.) Fox-Smythe Transportation Co., Ext—Oklahoma, 106 M.C.C. 1, 18.

"The stipulated restrictions, recognized and honored by the Hearing Examiner, and the withdrawal or inaction thereafter by the protestants *implies a recognition* by all that the proceeding without the restriction *could materially and adversely affect* the protestants. Notice to interested persons and their right to be heard are basic concepts of justice under law. It would be manifestly unfair and unjust to these plaintiffs and other interested parties for this court to permit them to be lulled into a false sense of security, protection, and inaction by allowing the Commission to remove the restrictions in the amended application without the interested parties and the public having been given notice by publication in the Federal Register so they could be heard."

The court then discussed cases where the Commission had broadened the grant of authority beyond that sought in the application, and on page 768 said:

"Without approving, but noting these cases, we should not extend the practice of broadening a grant of authority over that sought beyond these limited instances to a case with the extensive ramifications of the case at bar."

In May Trucking Co. v. United States, (D.Idaho 1968) 290 F.Supp. 38, the court at page 39 said:

"It is undisputed that the Commission erroneously issued a certificate to plaintiff granting interstate authority to plaintiff greater and different in scope than that applied for by plaintiff, and likewise greater than that indicated in the notice of application printed in the Federal Register.

"By and through the Order appealed from, the Commission seeks to correct its admitted error and

grant to the plaintiff the authority which plaintiff sought in its application. Plaintiff contends the Commission does not have the authority to correct such an error. We do not agree. We are of the opinion that the Commission has the power to correct its manifest error by canceling the outstanding certificate issued to plaintiff and reissuing a modified certificate granting the operating rights originally applied for by the plaintiff. The record before us clearly shows that the Commission has correctly exercised such power."

In Curtis, Inc. v. United States, (D.Colo. July 21, 1975) (not published), a three-judge court said:

"In this action Curtis seeks an order setting aside and annulling orders of the ICC entered in the Commission's proceeding No. MC-113678 (Sub-No. 285), Curtis, Inc., Extension—Meats Over Irregular Routes. The specific order which is attacked is the modification by the Commission of the certificate theretofore issued, Sub-No. 285, which modification imposed a no tacking restriction.

"The problem arose out of proceedings which started in 1967, at which time Curtis filed an application for new operating authority to transport over irregular routes. Curtis at that time held regular route authority to serve these points. This application was not designed, according to the application, to duplicate authority already given but, rather, to supplement it. Curtis did answer the question in the application regarding whether the authority sought could be tacked with the response 'Yes.' However, Curtis declined in further responses to indicate the points or areas where the operation would connect and the territory to be served by such joinder. It referred in an appendix to other and additional authority. In the

notice in the Federal Register no reference was made to the tacking possibilities raised by the application.

"The issuance of the Sub-285 authority was opposed by Ringsby Truck Lines, Inc., Midwest Emery Freight System, Inc. and Little Audrey's Transportation Company, Inc., but the tacking issue was never raised expressly. This opposition was withdrawn when Curtis gave assurance that it sought no new territory or commodity authority. One carrier, Frozen Food Express, Inc., specifically opposed the tacking, but withdrew its objection after correspondence with Curtis' counsel."

* * *

"Finally, in February 1974, the certificate was reissued with a no-tacking restriction. The sole question presented on this review is, as we view it, whether the Commission was empowered to modify its original order in order to correct any mistake. We conclude that it was so authorized. We further conclude that the Commission's ruling after the cause was reopened was fully supported."

* * *

"As we view the situation at bar the Commission acted within the law. It had a clear right to correct the mistake which occurred in connection with the initial grant of authority by imposing, the limitations against tacking, and we perceive no necessity for the existence of fraud or deception. To hold otherwise would give to Curtis an unfair advantage based upon mutual mistake of fact. Unquestionably the opposition carriers would have vigorously objected to the issuance of the Sub-285 authority had they known that it was to be used in the manner in which it was used follow-its issuance. We perceive no error in the Commission's

subsequent proceedings and we see no necessity for specifically considering the conduct of these hearings."

CONCLUSIONS

The Supreme Court in its opinion of December 23, 1974, granted to Bowman all operating authority embraced within the scope of its application as filed and presented to the Commission. By our decision today we hold that Bowman should be granted only the excess authority for which the Commission found from legal and competent evidence a public need existed.

We set aside as invalid only that portion of the Commission's order that granted Bowman excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need.

Accordingly, judgment is being entered today modifying our order of March 25, 1975, so as to authorize the Commission to issue a certificate of public convenience and necessity to Bowman Transportation, Inc., as authorized by the Commission in the action under review, with a modification restricting such authority to preclude the tacking or joining of such authority with the authority acquired by Bowman from Alabama Highway Express, Inc., pursuant to the Commission's order of July 8, 1968, in No. MC-F-9921.

This 2 day of September, 1975.

/s/ J. Smith Henley
Judge, United States Circuit Court

/s/ Paul X Williams
Judge, United States District Court

/s/ John E. Miller
Sr. Judge, United States District Court

APPENDIX B

(3) 49 United States Code Annotated, Sections 307(a) and (b).

§ 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways. Feb. 4, 1887, c. 104, Pt. II, § 207, as added Aug. 9, 1935, c. 498, 49 Stat. 551.

(1) 49 United States Code Annotated, preceding §1 note, §301 note, §901 note, and §1001 note.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPENDIX C

SERVICE DATE
SEPTEMBER 6, 1972

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 1st day of September, 1972.

No. MC-1124 (Sub-No. 206)
HERRIN TRANSPORTATION COMPANY EXTENSION—
ATLANTA, GA.
(Houston, Tex.)

(Reentitled)
McLEAN TRUCKING COMPANY EXTENSION—
ATLANTA, GA.
(Winston-Salem, N.C.)

No. MC-2229 (Sub-No. 132)
RED BALL MOTOR FREIGHT, INC., EXTENSION—
ATLANTA, GA.
(Dallas, Tex.)

No. MC-11207 (Sub-No. 233)
DEATON TRUCK LINE, INC., EXTENSION—
DALLAS, TEX.
(Birmingham, Ala.)

(Reentitled)
DEATON, INC., EXTENSION—DALLAS, TEX.
(Birmingham, Ala.)

No. MC-18088 (Sub-No. 36)
FLOYD & BEASLEY TRANSFER COMPANY, INC.,
EXTENSION—DALLAS, TEX.
(Sycamore, Ala.)

No. MC-59680 (Sub-No. 147)
STRICKLAND TRANSPORTATION CO., INC.,
EXTENSION—ATLANTA, GA.
(Dallas, Tex.)

No. MC-76177 (Sub-No. 304)
BAGGETT TRANSPORTATION COMPANY
EXTENSION—DALLAS, TEX.
(Birmingham, Ala.)

No. MC-94201 (Sub-No. 56)
BOWMAN TRANSPORTATION, INC., EXTENSION—
DALLAS, TEX.
(East Gadsden, Ala.)

No. MC-106401 (Sub-No. 18)
JOHNSON MOTOR LINES, INC., EXTENSION—
DALLAS, TEX.
(Charlotte, N.C.)

No. MC-111231 (Sub-No. 67)
JONES TRUCK LINES, INC., EXTENSION—
ATLANTA, GA.
(Springdale, Ark.)

Upon consideration of the record in the above-entitled proceedings, and of:

(1) Protest-representation and request for oral hearing of Colonial Refrigerated Transportation, Inc., in No. MC-94201 (Sub-No. 56), filed March 17, 1972,

pursuant to publication of grant of authority in the February 24, 1972, issue of the Federal Register, treated as a petition for leave to intervene embracing request for further hearing;

(2) Petition of Colonial Fast Freight Lines, Inc., in No. MC-94201 (Sub-No. 56), filed March 20, 1972, pursuant to publication noted in (1) above, for leave to intervene;

(3) Petition of Bell Transfer Company, Inc., in No. MC-94201 (Sub-No. 56), filed March 22, 1972, pursuant to publication noted in (1) above, for reopening the proceeding for further hearing;

(4) Petition of Southern Forwarding Company, in No. MC-94201 (Sub-No. 56), filed March 24, 1972, pursuant to publication noted in (1) above, for (a) leave to intervene, (b) reopening for further hearing, and (c) reconsideration in light of evidence to be adduced at the further hearing;

(5) Petition of Atlas Transit, Inc., in No. MC-94201 (Sub-No. 56), filed March 24, 1972, pursuant to publication noted in (1) above, for (a) leave to intervene, (b) reopening for further hearing, and (c) reconsideration in light of evidence to be adduced at the further hearing;

(6) Petition of Arkansas-Best Freight System, Inc., in No. MC-94201 (Sub-No. 56), filed March 27, 1972, pursuant to publication noted in (1) above, for (a) leave to intervene, (b) reopening for further hearing, and (c) reconsideration in light of evidence to be adduced at further hearing;

(7) Petition of Dean Truck Line, Inc., in No. MC-94201 (Sub-No. 56), filed March 27, 1972, pursuant to

publication noted in (1) above, for reopening the proceeding for further hearing;

(8) Motion of applicant in No. MC-94201 (Sub-No. 56), filed April 4, 1972, to strike, and (in the alternative to dismiss and reply to the protest-representation in (1) and the petitions in (2), (3), (4), (5), (6), and (7) above;

(9) Petition of Ryder Truck Lines, Inc., protestant, filed May 18, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(10) Petition of applicant in No. MC-111231 (Sub-No. 67), filed May 18, 1972, for reconsideration;

(11) Joint petition of Mercury Freight Lines, Inc., and East Texas Motor Freight Lines, Inc., protestants, filed May 19, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(12) Petition of applicant in No. MC-1124 (Sub-No. 206), filed May 22, 1972, for reconsideration and, alternatively, for reopening for further hearing;

(13) Joint petition of Holloway Motor Express, Inc., Consolidated Freightways Corporation of Delaware, Yellow Freight System, Inc., Transcon Lines, and T.I.M.E.-DC, Inc., protestants, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(14) Petition of applicant in No. MC-11207 (Sub-No. 233), filed May 22, 1972, for reconsideration;

(15) Petition of Jack Cole-Dixie Highway Company, protestant, filed May 22, 1972, for reconsideration

in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(16) Joint petition of Campbell Sixty-Six Express, Inc., ET&WNC Transportation Company, and Gordons Transports, Inc., protestants, filed May 22, 1972, corrected and supplemented May 30, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(17) Petition of Roadway Express, Inc., protestant, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(18) Petition of Braswell Motor Freight Lines, Inc., protestant, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18);

(19) Petition of applicant in No. MC-76177 (Sub-No. 304), filed May 22, 1972, for reconsideration;

(20) Petition of Red Line Transfer & Storage Company, Inc., protestant, filed May 22, 1972, for reconsideration in Nos. MC-2229 (Sub-No. 132), and MC-94201 (Sub-No. 56);

(21) Petition of applicant in No. MC-59680 (Sub-No. 147), filed May 22, 1972, for reconsideration;

(22) Late-tendered joint petition of Alamo, Express, Inc., Central Freight Lines, Inc., Eagle Motor Lines, Inc., and Red Arrow Freight Lines, Inc., protestants, filed May 23, 1972, for reconsideration in No. MC-94201 (Sub-No. 56);

(23) Joint reply by 41 shippers, interveners in support in No. MC-106401 (Sub-No. 18), filed June 12,

1972, to the petitions for reconsideration in No. MC-106401 (Sub-No. 18);

(24) Joint reply by Campbell Sixty-Six Express Inc., ET&WNC Transportation Company, Gordons Transports, Inc., and Red Line Transfer & Storage Company, Inc., protestants, filed July 12, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(25) Reply by applicant in No. MC-2229 (Sub-No. 132), filed August 14, 1972, to the petitions for reconsideration of the grant in No. MC-2229 (Sub-No. 132);

(26) Reply by applicant in No. MC-94201 (Sub-No. 56), filed August 14, 1972, to the petitions for reconsideration in (9) through (21) above;

(27) Joint reply by Mercury Freight Lines, Inc., and East Texas Motor Freight Lines, Inc., protestants, filed August 15, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(28) Joint reply by Transcon Lines and T.I.M.E.-DC, Inc., protestants, filed August 15, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(29) Joint reply by Roadway Express, Inc., and Roadway Express, Inc., of Mississippi, protestants, filed August 15, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(30) Reply by Braswell Motor Freight Lines, Inc., protestant, filed August 16, 1972, to the petitions in (10), (12), (14), (19), and (21) above;

(31) Reply by applicant in No. MC-106401 (Sub-No. 18), filed August 16, 1972, to the petitions for reconsideration of the grant in No. MC-106401 (Sub-No. 18);

(32) Joint petition of Braswell Motor Freight Lines, Inc., Campbell Sixty-Six Express, Inc., Deaton, Inc., Gordons Transports, Inc., and Red Line Transfer & Storage Co., Inc. protestants, filed August 18, 1972, for extraordinary relief under Rule 102 of the Commission's General Rules of Practice, embracing a request for review by the entire Commission;

and good cause appearing therefor:

It is ordered, That the late-tendered joint petition in (22) above be, and it is hereby, accepted for filing.

It is further ordered, That the petition in (32) above be, and it is hereby, rejected for the reason that the proceeding in its present posture is not the proper subject of a plea for relief directed to the entire Commission.

It is further ordered, That the petitions in (1), (2), (3), (4), (5), (6), and (7) above, collectively seeking leave to intervene, and requesting further hearing and reconsideration be, and they are hereby, denied and rejected, respectively, for the reasons (1) that the publication of the grant of authority in No. MC-94201 (Sub-No. 56) was made for the purpose of apprising the interested persons of the additional authorization to use Montgomery, Ala. as a gateway and to serve a specified point in Alabama for purposes of joinder only, which was not included in the notice of authority sought as originally published in the Federal Register issue of August 19, 1965; (2) that the petitioners' stated interests in No. MC-94201 (Sub-No. 56) are generally based either (a) on authority in conflict with the services proposed as set forth in the publication as originally made, and petitioners had ample notice and op-

portunity but failed to file timely protests at the time in the proceeding in which they now assert an interest or, as in the case of petitioner in (6) above, filed a timely protest and later withdrew said protest, (b) on authority acquired by them after the original publication, which authority does not conflict with the additional authorization necessitating republication or which, as in the case of petitioner in (3) above, although it may conflict with the additional authorization, it has not been shown to be prejudiced by the involved portion of the grant requiring republication, or (c) on authority acquired by applicant after the original publication, which authority was considered in the report and which is not relevant to the need for republication; (3) that the petitioners fail to show the extent to which they have been prejudiced, if at all, by the grant of authority to applicant in MC-94201 (Sub-No. 56) to the extent it authorized service at Montgomery, Ala. and a specified point in Alabama for purpose of joinder only; and (4) that, even if intervention were permitted and the proceeding reopened for the receipt of additional evidence relating to the authority acquired by certain of the petitioners subsequent to the original publication, there is no showing that such evidence would warrant a result different than that reached in the report and order of Division 1 with respect to the authorization to serve Montgomery, Ala. and a specified point for purposes of joinder only.

It is further ordered, That in view of the action taken in the next preceding paragraph, the motion in (8) above be, and it is hereby, overruled.

It is further ordered, That the proceeding in No. MC-111231 (Sub-No. 67), be, and it is hereby, reopened for reconsideration on the present record.

It is further ordered, That the petitions in (9) and (11) through (22) above, be, and they are hereby, denied, for

the reasons that the findings of Division 1, in its report and order of December 30, 1971, reported at 114 M.C.C. 571, in Nos. MC-1124 (Sub-No. 206), MC-2229 (Sub-No. 132), MC-11207 (Sub-No. 233), MC-18088 (Sub-No. 36), MC-59680 (Sub-No. 147), MC-76177 (Sub-No. 304), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18), are in accordance with the evidence and the applicable law and that no sufficient or proper cause appears for reopening the proceeding for reconsideration or further hearing.

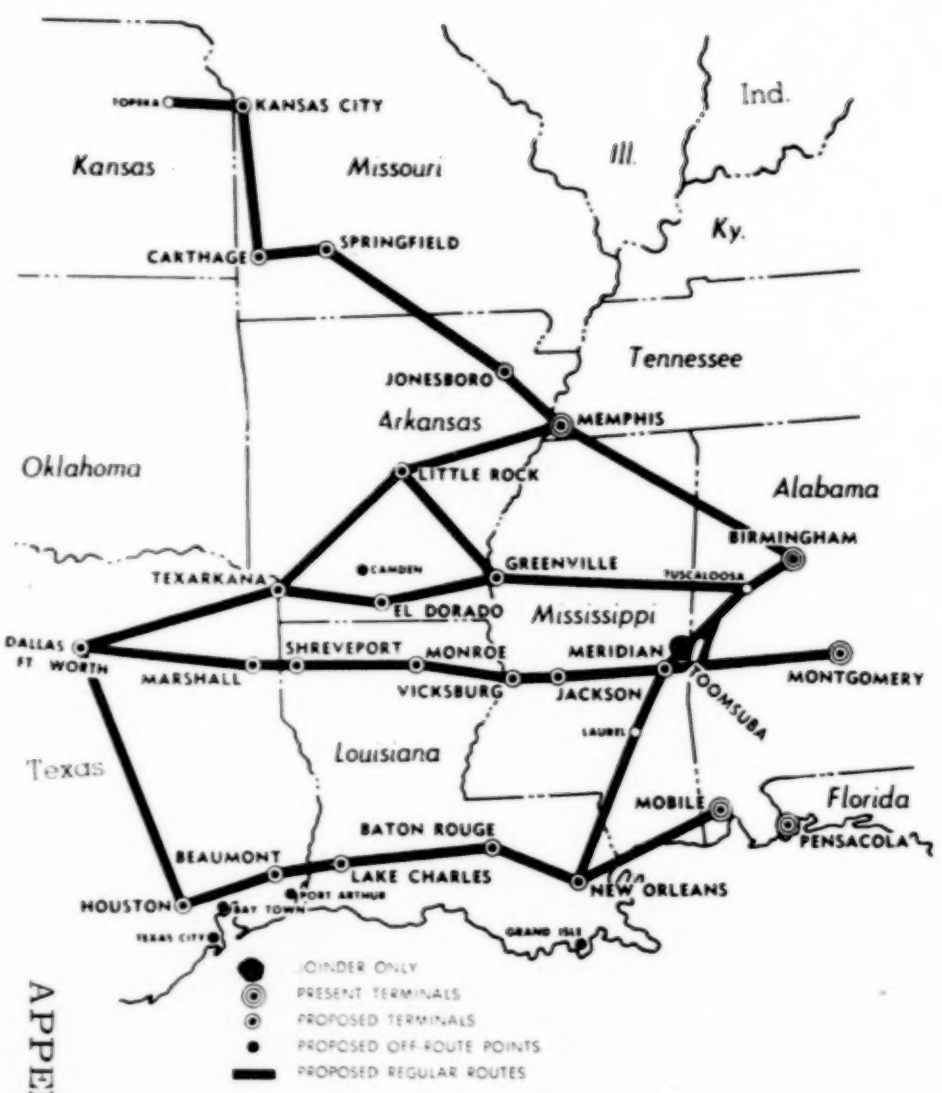
It is further ordered, That, unless compliance is made by applicants in Nos. MC-2229 (Sub-No. 132), MC-94201 (Sub-No. 56), and MC-106401 (Sub-No. 18), with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grants of authority made in the report and order entered herein on December 30, 1971, shall be considered as null and void and the applications shall stand denied in their entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

Joseph M. Harrington,
(Seal) Acting Secretary.

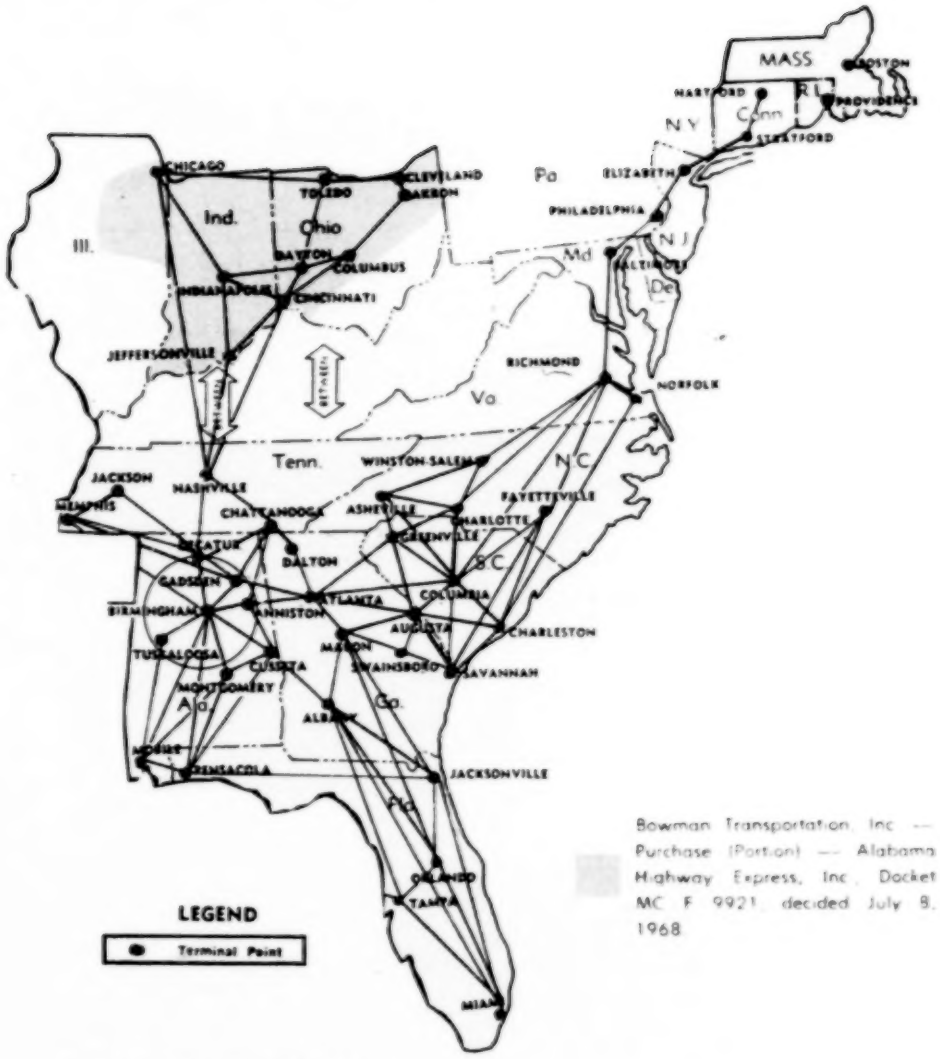
NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX D



APPENDIX D

SUB-56 AUTHORITY



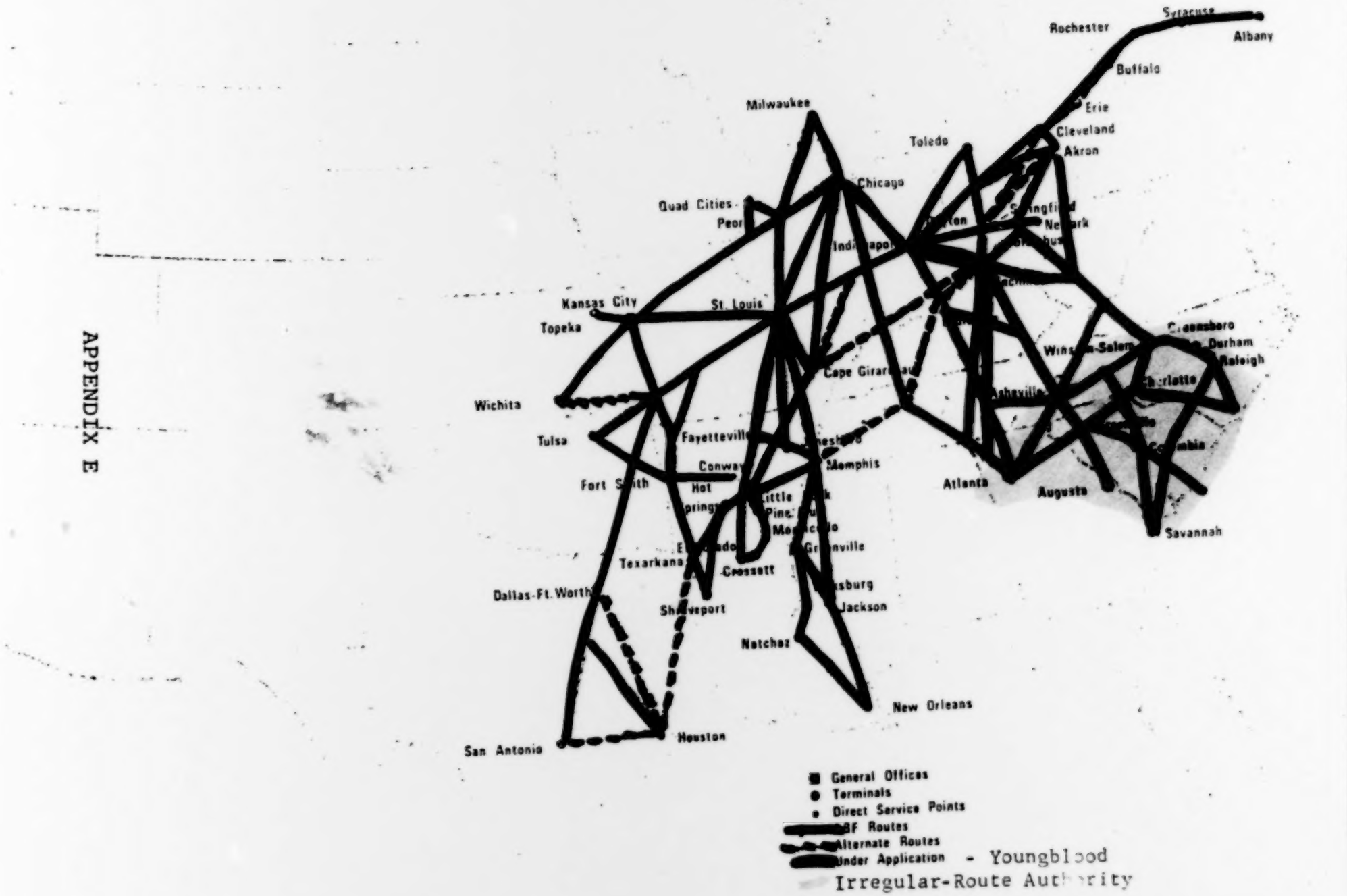
Bowman Transportation, Inc. — Purchase (Portion) — Alabama Highway Express, Inc., Docket MC F 9921, decided July 8, 1968

Service in connection with regular and irregular routes to and from all points in the shaded areas.

PRESENT AUTHORITY

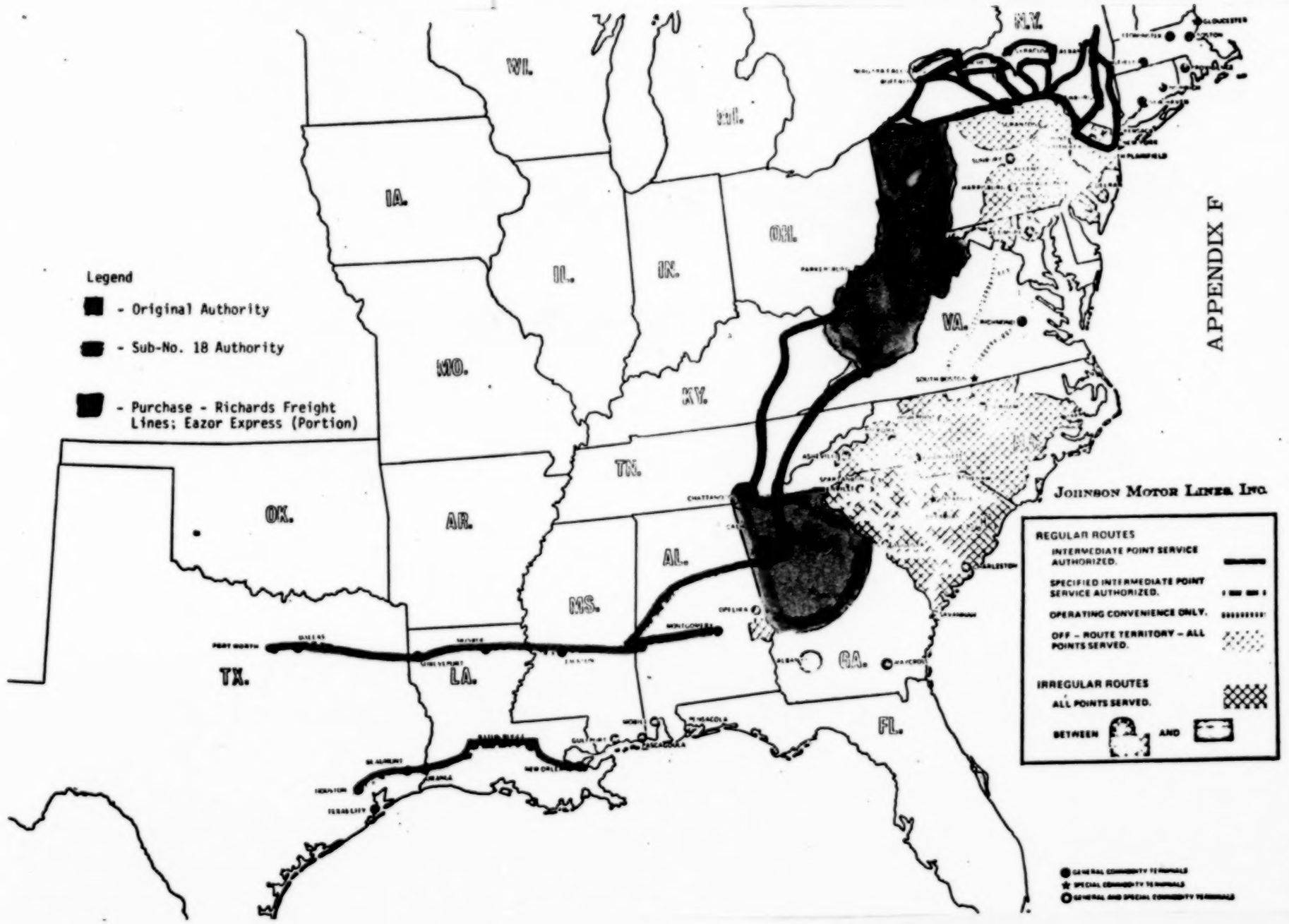
APPENDIX E

APPENDIX E



- Youngblood Irregular-Route Authority

APPENDIX F



APPENDIX F

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC.,
Appellant,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

APPELLEES' MOTION TO AFFIRM

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CASES

REGULATIONS AND STATUTE

In the Supreme Court of the United States

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BOWMAN TRANSPORTATION, INC.,
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vs.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

APPELLEES' MOTION TO AFFIRM

Appellees[1] in the above-styled cause move to affirm this case on the ground that the questions presented are so unsubstantial as not to need further argument.

1. Arkansas-Best Freight System, Inc., ET&WNC Transportation Co., Gordons Transports, Inc., Mercury Motors, Inc., Red Line Transfer and Storage Company, Inc., T.I.M.E.-DC, Inc., Transcon Lines, Yellow Freight System, Inc. and Jack Cole-Dixie Highway Company.

QUESTION PRESENTED

Following remand to it by this Court, the District Court upheld the grant to a motor carrier of certain operating authority that exceeded the scope of the carrier's application to the ICC, holding that the grant of such excess authority was supported by evidence and by a Commission finding of public need therefor. However, as to certain other operating authority that exceeded the scope of the carrier's application, the District Court recognized and held that there was *no* evidence in the record to support the grant of such authority and that *no* finding of public need therefor had been made by the Commission. The question presented is:

> Did the District Court err in setting aside the grant of that portion of the operating authority that exceeded the scope of the carrier's application, for which there was no supporting evidence in the record and no Commission finding of public need?

STATEMENT OF THE CASE

This is the second time this case has been before this Court. Initially, the case involved a decision of the Interstate Commerce Commission granting additional operating authority to three motor common carriers (Bowman Transportation, Inc., Johnson Motor Lines, Inc., and Red Ball Motor Freight, Inc.). The three-judge District Court had found that there was no rational basis for the determinative findings and conclusions set forth in the Commission's order and held such order invalid.[2] On appeal, this Court

2. *Arkansas-Best Freight System, Inc.* v. *United States*, 350 F.Supp. 539, 364 F.Supp. 1239 (W.D. Ark. 1972, 1973).

reversed such judgment and upheld the grant by the Commission of all authority embraced within the scope of the three applications filed by the appellant carriers.[3] However, this Court did not uphold the Commission's grant to appellant Bowman of operating authority that exceeded the scope of that appellant's application to the Commission.

In its initial decision the District Court had expressed disapproval of the Commission's failure to sustain the claim of appellees (plaintiffs below) that the Commission improperly granted to appellant Bowman certain operating authority that exceeded the scope of the application that Bowman presented to the Commission. Recognizing that the District Court's consideration of the grant of excess authority to Bowman was not necessary to that court's decision to set aside the Commission's approval of all the applications, and that such issue was not briefed and argued on appeal, this Court remanded that aspect of the Bowman case for decision by the three-judge District Court.[4]

Pursuant to this Court's mandate, the District Court entered an order terminating its prior injunction, thereby authorizing the Commission to issue the certificates of public convenience and necessity to Red Ball and Johnson as approved by this Court. Further complying with this Court's mandate, the District Court also authorized the Commission to proceed with the issuance of a certificate to Bowman, authorizing Bowman to conduct all operations

3. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281 (Dec. 23, 1974; rehearing denied Feb. 24, 1975).

4. The last sentence of this Court's opinion referred to Bowman's "original application." While Bowman *reduced* the scope of its original application, by restrictive amendments submitted during the course of the agency hearing (J.S., App. A, p. 28), it never sought to *enlarge* such scope and it never requested or even suggested to the Commission that any excess authority be granted.

embraced within the scope of Bowman's application to the Commission. Pending judicial determination of the issue remanded to the District Court, that court directed the Commission to refrain from granting Bowman any operating authority that exceeded the scope of the Bowman application (J.S., App. A, pp. 26-27).

The Commission thereupon promptly issued the approved certificates to Red Ball and Johnson. However, the approved certificate was not issued to Bowman, in view of the pendency of a separate proceeding in which the Commission had charged Bowman with failure to fulfill its obligations to the public under previously granted certificates.[5]

Following the submission of briefs and oral arguments dealing with the issue on remand, the District Court rendered its decision as to the validity of the Commission's grant to Bowman of operating authority that exceeded the scope of Bowman's application to the Commission. As explained in the District Court's opinion, the Commission's order granted Bowman operating authority that exceeded the scope of the Bowman application as follows:

> "(1) The Commission granted excess authority to Bowman to serve points on the Montgomery route and to use Montgomery as a gateway, and (2) it failed to include in its restrictions a provision that would prevent Bowman from joining newly acquired authority

5. "The certificates in these proceedings are being held in abeyance pending the determination of Bowman's fitness in the instant proceeding." *Bowman Transportation, Inc.—Investigation and Revocation of Certificates*, No. MC-C-8412, Initial Decision, April 23, 1975. By order dated September 18, 1975, terminating that proceeding, the Commission admonished Bowman to fulfill its obligations under its certificates, but concluded that its past conduct would not be deemed a bar to the issuance of future certificates. Although the impediment of that proceeding has now been removed, the certificate approved in the present proceeding has not as yet been issued to Bowman.

> with the authority acquired by Bowman subsequent to the hearing herein by purchase from Alabama Highway Express." (J.S., App. A, p. 31).

The District Court concluded "that by giving to the Commission's finding every possible presumption of correctness and by interpreting the findings in the light most favorable to the Commission, it [the District Court] can uphold the Commission's grant described as in (1) above, but not that described as (2)." (J.S., App. A, p. 31).

No appeal has been taken from the District Court's approval of the excess authority granted Bowman as described in (1) above.

No appeal has been taken by the defendants, the United States of America and the Interstate Commerce Commission, from the District Court's finding that the Commission erred in granting to Bowman the excess authority described in (2) above.

The only appeal is by intervening defendant Bowman which challenges the authority of the District Court to hold invalid the Commission's grant of such excess authority to Bowman, even though such appellant does not challenge the court's finding that (a) no evidence appears in the record to support such grant and (b) there was no finding by the Commission of any public need for the grant of such authority.

Appellant Bowman repeatedly charges the lower Court with improperly *modifying* a certificate issued by the ICC and "judicially approved by the Supreme Court." (See, *e.g.*, J.S. p. 4). As noted, no certificate has actually been issued to Bowman; therefore, there has been no modification. In addition, in its prior opinion this Court held that "the issue of conformity of the Bowman certificate

to its application is one for the District Court," recognizing that such issue "was not briefed or argued here, owing to the limitation set forth in our order noting probable jurisdiction." Pursuant to this Court's mandate, the Commission has been free to issue to Bowman the only "judicially approved" certificate; that is, a certificate embracing all authority within the scope of Bowman's application. Since the entry of the District Court's order on remand, the Commission has been free also to issue to Bowman a certificate embracing the excess authority described in (1) above. At no stage of the proceeding has there been any judicial approval given to the Commission's grant to Bowman of the excess authority described in (2) above. The Commission's failure to date to issue a certificate to Bowman does not relate to any issue in this proceeding.

Appellees contend that, pursuant to this Court's mandate, the District Court properly discharged its statutory responsibilities in directing the ICC to refrain from granting to Bowman operating authority that Bowman did not seek, since no evidence was presented that such authority would meet the convenience or necessity of the public, and since no finding was made by the Commission that there was any public need for such service.

THE QUESTIONS ARE NOT SUBSTANTIAL

The District Court Accorded Every Presumption of Correctness to the Commission's Order.

The issue remanded to the District Court for consideration was quite limited. This Court approved the Commission's grant to Bowman, Red Ball and Johnson of *all* operating authority embraced within the scope of the applications as presented to the Commission. The only issue that remained was the propriety of the Commission's grant to Bowman of authority that Bowman did not seek either in its application to the Commission or in its pleadings and briefs subsequently filed with the Commission. This Court noted that "the District Court indicated disapproval of the Commission's action" in granting such excess authority to Bowman, but recognized that "the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all of the applications." This Court did not consider it appropriate to resolve that issue on the prior appeal since it "was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction." (J.S., App. A, p. 25).

In disposing of that issue on remand, the District Court *upheld* the grant to Bowman of all excess authority that was the subject of any findings in the Commission's order that could be construed to support such action by the Commission. In reaching that result, the court "endeavored to give to the Commission's order every possible presumption of correctness and to resolve every ambiguity in a way that would support the conclusions of the agency." (J.S., App. A, p. 28). In addition, it was also necessary for the court to interpret the Commission's findings "in the light most favorable to the Commission" (J.S., App. A, p. 31), since such findings were by no means clear or positive.[6]

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6. Bowman itself presented little or no evidence that could be construed to support a finding of need for the excess authority approved by the District Court. "This testimony was proffered primarily in support of some other carriers whose applications were heard on the consolidated record and was not specifically presented in support of any proposal by Bowman . . . However, in a proceeding of this type the Commission may properly consider all evidence of record regardless of which applicant was responsible for the presentation of such evidence." (J.S., App. A, pp. 30-31).

The extent of the District Court's decision on remand is succinctly stated in its conclusion:

> "We set aside as invalid only that portion of the Commission's order that granted Bowman excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need." (J.S., App. A, p. 44).

In its brief and arguments on remand, Bowman did not cite to the court any evidence of record that could be construed as supporting a need for service between the points involved in such excess grant. The Commission, in its report, made no finding of public need for such service.

In its Jurisdictional Statement, Bowman does not challenge the correctness of the above-quoted finding of the District Court.

Appellant Does Not Take Issue With the Factual Basis of the District Court's Decision.

In 1965, when Bowman filed its application with the Commission, it held authority from the Commission to operate as a common carrier throughout an extensive area embracing essentially 13 states in the southeastern and eastern portions of the country. It sought authority to extend its operations westward from Alabama into Mississippi, Louisiana, Texas, Arkansas, Missouri and Kansas. However, its proposal was limited by certain key restrictions set forth in the application. These restrictions clearly stated that Bowman was not proposing to perform any local service between points on the proposed routes. Its proposal was limited entirely to the handling of long-haul traffic moving to or from a point then served by Bowman under its *existing* authority. In other words,

Bowman sought to join or tack[7] its "present authority" (shown in yellow, App. D, J.S., p. 57) with the new area sought to be served (shown in black, App. D, J.S., p. 57). As noted, this restriction severely limited the scope of Bowman's application, since without such restriction the proposal would have included the handling of traffic moving, for example, between Arkansas and Texas, between Kansas and Louisiana, between Missouri and Mississippi, and so on. No such service was proposed since Bowman sought only to handle traffic moving between points in its present territory, on the one hand, and, on the other, points in the new territory.

Specifically, the application stated this proposal as follows:

> "Applicant seeks authority and proposes to tack all authority granted herein to its present rights under Certificate MC-94201 and subs, an accurate copy of which is attached to the application." (Form BMC 78, filed July 12, 1965, Ex. A, p. 6).

In addition, Bowman also specified that it "does not seek authority to serve between any points west of its presently authorized points." 114 M.C.C. 571, 585.

In further explanation of its proposal, Bowman's application attached copies of its "present authority" and a map showing its "present authority" in the states of "Ala., Conn., Del., Fla., Ga., Md., N.J., N.Y., N.C., Pa., S.C., Tenn., Va. and Washington, D.C."

Pursuant to its rules, the ICC gave public notice of Bowman's application by publication in the Federal Reg-

---

7. "Tacking" is the term normally utilized by the Commission to describe the joinder of routes and territories.

ister.[8] This publication described in detail the routes and territories sought to be served by Bowman and summarized the restrictive nature of the proposals. As to the proposed joinder of such routes, the notice stated:

> "Applicant also states that it intends to tack the above proposed routes with each other and with that authority previously granted under certificates No. MC-94201 and subs . . . ."

Although Bowman subsequently *reduced* the scope of its application by further restrictive amendments, *no request was ever made by Bowman for an enlargement of the application.*

The District Court's initial opinion commented on the terminology used in the Federal Register publication.[9] On remand the court repeated these comments and also considered, for the first time, the restrictive terminology of the application itself[10] (J.S., App. A, pp. 32-33, 36). The District Court properly determined that the Federal Register publication is, by statute and judicial authority, "notice to all interested parties." See 44 U.S.C. §1507; *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947); *Buckner Trucking, Inc.* v. *United States,* 354 F.Supp. 1210 (S.D. Tex. 1973).

The District Court also found that the appellees and other interested parties were entitled to rely on the representations contained in the application. *Baggett Transportation Co.* v. *United States,* 206 F.Supp. 835 (N.D. Ala. 1962); *Eagle Motor Lines, Inc.* v. *United States,* 331 F.Supp. 80 (N.D. Ala. 1971) (J.S., App. A, p. 37).

8. "Notice of the filing of application to competitors and other interested persons will be given by the publication of a summary of the authority sought in the FEDERAL REGISTER. Such summary will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought." 49 CFR ¶ 1100.247(c)(1).

9. 364 F.Supp. at 1255.

10. The District Court found that: "There is nothing ambiguous in the application or in the notice describing the proposal." (J.S., App. A, p. 36).

Subsequent to the close of the hearing before the Commission, Bowman filed a separate application seeking approval of the purchase by Bowman of additional operating authority from Alabama Highway Express (AHE). The AHE authority duplicated some of Bowman's existing authority in Tennessee and Florida, but embraced the states of Ohio, Indiana and Illinois, a completely new territory for Bowman.[11] Although Bowman consummated its purchase of the AHE authority while the present proceeding was awaiting final decision by the Commission, Bowman at no time modified its proposal by requesting or even suggesting that it be granted the right to join or tack the authority sought in this proceeding with that acquired from Alabama Highway Express. On the contrary, Bowman repeatedly and consistently described its proposal in terms of its application and the notice thereof published in the Federal Register, stating:

> "The purpose of the Bowman application is:
>
> > "To provide a reliable and expeditious single-line service between the eastern and southeastern points served by Bowman in the states of Florida, Georgia, Alabama, Tennessee, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, and Connecticut, and the Southwestern and Central points here involved."[12]

11. The new (AHE) territory is shown in green on Bowman's map (J.S., App. D, p. 57).

12. Note that Ohio, Indiana and Illinois (the AHE territory) are not included. This explanation appeared at the outset of

(Continued on following page)

In like manner, Bowman consistently represented to the Commission that, if granted the requested authority, "Bowman will coordinate its existing service throughout its *13 eastern and southeastern states* and the 47 new points proposed to provide a regular, dependable and consistent service between its present and proposed points." (Emphasis added). Bowman defined the "involved area" as "southeast-southwest."[13] At no point in any brief or pleading, until *after* the Commission's decision, did Bowman represent its proposal as including a proposed joinder of the requested authority with the AHE authority.

There were, of course, several reasons why Bowman did not seek to enlarge the application beyond its original scope. These included the following:

1. The record in this proceeding was closed before Bowman started the AHE acquisition, and there was no evidence in the record of any need for additional service between points in the AHE territory, on the one hand, and, on the other, points on the proposed routes.

2. Any movement of traffic between such points would have required Bowman to utilize circuitous routes with resulting waste of fuel and money.

3. Numerous carriers[14] provided service between such points over direct routes.

Footnote Continued—

Bowman's initial brief to the Hearing Examiners (pp. 3-4) and was repeated in Bowman's exceptions brief filed subsequent to its acquisition of the AHE authority (Bowman Exceptions, pp. 5, 7, 8, 80).

13. See, *e.g.*, Bowman initial brief, pp. 10, 17-19, 50, 56, 60, 63, 66, 71, 75; Bowman exceptions, pp. 7-8, 30-31, 80.

14. These included appellees Arkansas-Best, Gordons, T.I.M.E.-DC, Transcon, and Yellow.

4. Such an enlargement of Bowman's application would have required a showing of good cause[15] and republication in the Federal Register, thereby subjecting Bowman's application to additional protests and additional delays.

5. Bowman's operating plan, described in the record, did not include such a proposal, and further evidence would have been required to determine the feasibility of operations over the circuitous routes that would be involved in any joinder of the routes sought with the AHE territory.

However, when the Commission granted the Bowman application, it failed to use appropriate terminology to confine the authority granted to that sought in the Bowman application. Accordingly, the excess authority permitted by the Commission's order would constitute a pure windfall to Bowman.[16] This apparently inadvertent error was immediately brought to the Commission's attention by numerous parties, including several of the appellees.[17] The Commission declined, however, to correct such error.[18]

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15. "Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the FEDERAL REGISTER." I.C.C. Rules, 49 CFR ¶ 1100.247(c)(2).

16. Thereby *permitting* Bowman to perform such service, if and when it deemed it advantageous to do so, but with no *commitment* to do so upon which the public or the Commission could rely.

17. See, *e.g.*, Petition of appellees ET&WNC, Gordons, et al., filed May 22, 1972, p. 159-a; Petition of appellee ABF, filed March 27, 1972, pp. 4-5. The Jurisdictional Statement mentions only the contentions of ABF, ignoring the fact that other parties sought correction of this error as soon as it first appeared.

18. Commission Order dated September 1, 1972 (J.S., App. C).

As previously noted, the Commission's report contained no finding of a public need for operations between the AHE territory and the new territory sought by Bowman. No such finding could have been made since the Commission recognized that *none of the evidence of record dealt with the movement of traffic between such areas.* For example, the Commission described the territorial scope of the application as follows:

> "Generally, the involved traffic moves (1) between points in the Southwest, on the one hand, and, on the other, points in the Southeast, Middle Atlantic, and New England States; (2) between points in the Midwest, on the one hand, and on the other, points in the East and Southeast; and (3) between points in the East and Southeast, on the one hand, and, on the other, points in Mississippi."[19] 114 M.C.C. at 592.

By means of a voluminous appendix to its report, the Commission summarized all of the supporting evidence on a geographical basis. This summary shows that *no witness testified in the proceeding concerning the movement of traffic to or from any point in the AHE territory* (114 M.C.C. at 636-756).

In its ultimate conclusion, the Commission made it clear that its findings of public need for Bowman's service did *not* embrace the AHE territory (Ohio, Indiana and Illinois):

> ". . . We are of the opinion that Bowman has persuasively demonstrated a need for its services between specified points in Mississippi, Kansas, Missouri, Arkansas, Louisiana and Texas, on the one hand, and, on the other, *those points in the Southeast and East that it presently serves.*" 114 M.C.C. at 605 (Emphasis added).

19. The Commission defined the involved area of the "Midwest" as embracing only Kansas and Missouri. 114 M.C.C. at page 592; Note 22, page 595; Appendix F, page 757. A similar geographical analysis appears on pages 599-600 of the report.

The District Court Acted Within the Scope of the Remand.

Bowman suggests (J.S., pp. 4-5) that the issue of tacking the AHE authority was not embraced within the scope of the issues specified by this Court for decision by the District Court on remand. There is no merit to this contention. In its initial decision the District Court described in detail the manner in which the Commission's order granted to Bowman authority that exceeded the scope of the Bowman application. More specifically the District Court indicated clearly its view that the Commission erred in failing to include in its order a provision prohibiting Bowman from tacking the authority granted in this proceeding with the AHE authority. The District Court noted that appellees had properly objected to such Commission action, and expressed its disapproval of the Commission's failure to sustain such objections. 364 F. Supp., at 1255 (See also J.S., App. A, pp. 28-29). On appeal, this Court stated:

> "Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications."

This Court then stated that:

> ". . . we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand." (J.S., App. A, p. 25).

The lower court's initial opinion demonstrates that when "the District Court spoke of the Commission's action in this regard," it spoke *primarily* of the Commission's failure to restrict Bowman from tacking the AHE authority with the new authority.

The District Court's opinion clearly considered and disposed of any question concerning the scope of the issue remaining open on remand (J.S., App. A, pp. 27-30).

Response to Bowman's Contentions

Appellees submit that no substantial question has been raised by appellant. However, a brief response to certain arguments appears to be warranted in view of certain unfounded assertions made by Bowman in its Jurisdictional Statement.

Bowman has suggested that appellee Arkansas Best (ABF) relies upon its acquisition of Youngblood Truck Line, Inc. in 1971 as a basis for its opposition to the tacking of the AHE authority. This is not correct. ABF's petition for reconsideration, further hearing, etc., filed pursuant to the Federal Register republication of February 24,

1972, makes clear its interest in the proceeding,[20] and such interest is wholly unrelated to the Youngblood proceeding. In addition, Bowman simply ignores the interest of other appellees, as specified in the petitions they filed with Commission seeking correction of this error.[21] The Youngblood territory is not involved in the issue decided by the District Court.

In its Jurisdictional Statement, appellant discusses the Commission's general policy regarding tacking of operating authorities. Appellees do not quarrel with appellant's statement of Commission policy or with the cases cited in regard thereto.[22] None of those cases involved applications

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20. "The attention of the Commission is also invited to the fact that by virtue of this purchase [Alabama Highway Express], Bowman was authorized to serve points in Indiana, Tennessee, Illinois and Ohio. Said points are depicted on Bowman's map which is attached hereto and marked Exhibit 5 and made a part hereof. For comparison purposes, ABF attaches a copy of its map which is marked Exhibit 6. A comparison of the Bowman map and ABF map will reflect that as a result of the proposed grant of authority in Sub 56, Bowman can handle traffic originating at and destined to the states of Texas, Louisiana, Mississippi, and Arkansas, on the one hand, and parts of Illinois and Ohio and all of Indiana on the other. No evidence was introduced at the time of the hearing to show a need for this authority, and ABF is prejudiced by the grant of this authority in that Bowman's subsequent purchase of the authority of Alabama Highway Express as herein noted did not occur until after the close of evidence in Sub 56."

21. "The Division also erred in failing to impose a restriction that would prohibit Bowman from performing service between the points here sought to be served and the new points acquired by Bowman subsequent to the hearing. As previously noted, Bowman would be authorized to perform service, for example, on traffic moving between Louisiana and Mississippi, on the one hand, and, on the other, Ohio, Indiana and Illinois points. Traffic of this nature was not involved in this proceeding and the Division erred in failing to recognize this fact." (Petition For Reconsideration of appellees ET&WNC and Gordons, May 22, 1972, p. 159-a).

22. The District Court also recognized these principles, both in its initial decision and in its opinion on remand (J.S., App. A, p. 32). In fact, it is because of this general policy that protective terminology must be utilized to conform the Bowman grant to the Bowman application.

similar to Bowman's in which specific and limited tacking proposals were set forth. None involved Federal Register notices specifying such a proposal. The applicable cases are those cited by the District Court. See *Baggett Transportation Co.* v. *United States*, 206 F.Supp. 835 (N.D. Ala. 1962); *Eagle Motor Lines, Inc.* v. *United States*, 331 F.Supp. 80 (N.D. Ala. 1971); *Georgia-Florida-Alabama Transportation Company* v. *United States*, 290 F.Supp. 764 (M.D. Ala. 1968); *May Trucking Company* v. *United States*, 290 F. Supp. 38 (D. Idaho 1968); and *Curtis, Inc.* v. *United States*, ... F.Supp. ..... (D. Colo. July 21, 1975) (J.S., App. A, pp. 37-44). In each of these cases the court recognized that the Commission and interested parties must be able to rely upon representations embodied in applications before the Commission in order to protect the integrity of the administrative process and to avoid denial of due process. Clearly, the District Court was correct in finding that it was Bowman which defined the limitations and restrictions on the authority which it sought, and that it would constitute a denial of due process to enlarge the scope of such authority in the absence of (a) any evidence in support of such an enlargement and (b) any finding of public need therefor.

Bowman's examples of recent grants of authority to other carriers (J.S., pp. 10-11) are not appropriate to the matters involved in this proceeding because those carriers did not seek the limited type of authority described by Bowman in its application.

Bowman discusses (J.S., p. 10) a hypothetical movement of traffic between Akron, Ohio and Dallas, Texas. It is important to realize that this is a hypothetical example, and that no evidence was offered by Bowman or any other carrier as to a need for service between such areas. In stating its hypothesis, Bowman failed to explain that

shipments between such points would normally move over direct routes utilized by appellees and others that operate between such cities. Further, Bowman's suggestion of unnecessary duplication of operating rights is contrary to the scope of its own application. For example, Bowman sought authority over a route between Dallas, Texas and Birmingham, Alabama via Jackson, Mississippi. However, Bowman limited its proposal by stating that it would not handle traffic moving between Dallas and Jackson. In other words, under the Commission's grant, Bowman can pick up traffic in Dallas and carry such traffic through Jackson, but it cannot deliver such freight at Jackson. This is not unusual in the motor carrier industry, and Bowman's argument involving duplication is without merit in fact or in theory.

Finally, Bowman suggests that the District Court imposed its restriction in an area greater than that sought by appellees, in that appellees did not seek to impose the no-tacking restriction as to the states of Tennessee and Florida. The lower court's decision was correct in this regard. The no-tacking provision will not affect Bowman operations in Tennessee and Florida because Bowman's *existing* authority (described in its application and the Federal Register notice) included the right to serve all points in Tennessee and in Florida.

CONCLUSION

The District Court found:

"We can find no way in which judicial approval can be given to the Commission's grant of the excess tacking authority. The requisites for a lawful grant of authority greater than that proposed in the applica-

tion are (1) a finding supported by substantial evidence of a public need therefor; (2) republication of the enlarged grant so as to afford interested parties adequate notice thereof; and (3) consideration of objections thereto following republication. The absence of the establishment of each of the requisites results in depriving the person or corporation of due process." (J.S., App. A, p. 37).

In the court below all parties agreed that the above statements constitute a correct summary of the principles applicable to the issue on remand. Indeed, in its brief on remand, the government frankly acknowledged that "[h]ad Bowman affirmatively indicated that it *did not intend* to tack these rights with any others to be subsequently obtained, plaintiffs' [appellees'] contentions would be appropriate." (Government Brief, p. 20). The Court concluded that this intention *was* clearly expressed in the Bowman application and in the Federal Register notice thereof.[23]

Bowman does not take issue with the correctness of the court's statement of the governing principles applicable to this proceeding. In like manner Bowman does not take issue with the court's finding that Bowman's intention was clearly stated in its application and in the Federal Register notice thereof. In effect, Bowman simply takes the position that there are *no* conditions or situations under which a court can properly hold invalid any portion of an order of the ICC in a proceeding that involves an issue of public convenience and necessity.

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23. "There is nothing ambiguous in the application or in the notice describing the proposal." (J.S., App. A. p. 36). "The published language constitutes a specific limitation regarding tacking which did not give notice to the public of any intention to tack the authority sought in the present proceeding to authority subsequently acquired." (J.S., App. A, pp. 32-33).

The scope of the District Court's decision is summarized in its "Conclusions" (J.S., App. A, p. 44):

(1) "The Supreme Court in its opinion of December 23, 1974, granted to Bowman all operating authority embraced within the scope of its application as filed and presented to the Commission."

(2) "By our decision today we hold that Bowman should be granted only the excess authority for which the Commission found from legal and competent evidence a public need existed."

(3) "We set aside as invalid only that portion of the Commission's order that granted Bowman excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need."

Approval of the grant of the excess authority discussed in (3) above would have done violence to the statutory requisites for the issuance of operating authority,[24] and would have been an abdication of the reviewing court's responsibilities inherent in the mandate of this Court and in the provisions of the Administrative Procedure Act, 5 U.S.C. §706.

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24. ". . . a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations *covered by the application*, if it is found that the applicant is fit, willing, and able properly to perform *the service proposed* . . . and that the *proposed service*, to the extent to be authorized by the certificate, *is or will be required by the present or future public convenience and necessity;* otherwise such application *shall be denied.*" 49 U.S.C. §307(a) (emphasis added). The only portion set aside by the court was that not "covered by the application," for which there was no "service proposed," and for which there was no finding that it "is or will be required by the present or future public convenience and necessity."

There is no substantial question presented by this appeal. The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 75-676

In the Supreme Court of the United States

OCTOBER TERM, 1975

BOWMAN TRANSPORTATION, INC., APPELLANT

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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ARTHUR J. CERRA,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC., APPELLANT

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This memorandum is submitted in response to this Court's order of January 12, 1976, inviting the Solicitor General to express the views of the United States.

STATEMENT

Bowman Transportation Company appeals from the judgment of the three-judge district court modifying an order of the Interstate Commerce Commission (the "Commission") granting it certain motor common carrier operating authority. That modification would preclude appellant from "tacking" or combining authority granted by the instant certificate of public convenience and necessity with certain other authority it already possessed, and thus preclude it from providing through transportation service between the geographic areas covered by the new certificate and those points it presently serves. The United States and the Commission were defendants in the district court but have not appealed from its adverse decision.

The same three-judge court previously had set aside the Commission's order granting additional route authority to appellant and two other carriers. This Court reversed that decision in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281. As to the other two carriers, this Court held that the Commission's grant of authority was valid and should be sustained. As to appellant, however, this Court noted that an issue not previously considered by the district court remained unresolved, and it therefore remanded the case for consideration of the lawfulness of the Commission's grant of so-called "excess" authority to appellant.[1]

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[1]In remanding the case to the district court, this Court stated (419 U.S. at 299-300):

> As to appellant Bowman, however, an issue remains. In granting Bowman a certificate the Commission noted that the authority sought by Bowman exceeded that set forth in Bowman's application. The "excess" was granted, subject to a condition precedent of publication in the Federal Register of Bowman's request for the excess authority. Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the Court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications.
>
> While we have on occasion decided residual issues in the interest of an expeditious conclusion of protracted litigation, see *Consolo* v. *FMC*, 383 U.S. 607, 621 (1966), we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand.

The Court added, however, that the remand order "provides no basis for depriving [appellant] of authority conferred by the Commission that was within its original application." *Id.* at 300.

On remand, the original plaintiffs argued that the Commission had granted Bowman excess authority in two ways: by authorizing it to serve Montgomery, Alabama, and to use that city as a gateway, subject to publication of its intention in the Federal Register in order to remedy the defective notice in appellant's original application; and by failing to prohibit appellant from tacking the authority granted in this proceeding with certain operating authority it had purchased from Alabama Highway Express after the filing of the instant application (Docket No. MC-F-9921). The United States, the Commission and appellant contended that the propriety of the tacking restriction was not included within the scope of this Court's remand order. But the district court held that it was authorized to consider the tacking question in the remand proceedings (J.S. App. 31-33).

The court concluded that the Commission had properly granted appellant the authority to serve Montgomery, since a public need had been shown for this service and the defective notice had been cured by subsequent publication in the Federal Register (J.S. App. 31). However, it determined that the Commission had improperly failed to include a restriction against appellant's tacking the subject authority with the authority previously purchased from Alabama Highway Express, on the ground that a public need for combining these two services had not been demonstrated (J.S. App. 36-37). The court interpreted appellant's application as containing a self-imposed limitation that it would not tack the sought after authority with any other authority acquired after its filing (J.S. App. 36). See also *Arkansas-Best Freight System, Inc.* v. *United States*, 364 F. Supp. 1239, 1255 (W.D. Ark.), reversed on other grounds, 419 U.S. 281. The court therefore held that the Commission's failure to impose a tacking restriction constituted an otherwise unjustified

grant of authority in excess of that sought in the application and directed the Commission to modify appellant's certificate of public convenience and necessity to include such a restriction (J.S. App. 44).

ARGUMENT

Appellant's jurisdictional statement presents two questions: Whether the district court's consideration of the tacking issue exceeded the scope of this Court's remand order; and, if the tacking issue was properly considered by the court below, whether that court erred in overturning this aspect of the Commission's decision. While we have serious doubts about the correctness of the district court's decision, we do not believe that either issue is of sufficient importance to warrant plenary consideration by this Court. We suggest that summary disposition is appropriate.

1. This Court itself is in the best position to determine whether it intended the district court to consider any issue on remand other than the propriety of the Commission's grant of authority to serve Montgomery, Alabama, subject to republication in the Federal Register. Resolution of this issue would not be advanced by the filing of additional briefs or oral argument. If this Court intended that the district court's inquiry on remand be limited to this particular question, then its decision should be summarily reversed, with directions to sustain the Commission's decision. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154; *United States* v. *Dixie Highway Express*, 389 U.S. 409.

2. If this Court intended that the lower court not be precluded from considering the tacking issue, the only remaining question is whether the district court properly held that the Commission was obligated to impose a restriction against appellant's tacking the authority

granted in this proceeding with the authority it purchased from Alabama Highway Express. Appellant's original application stated that it intended to tack the authority described in that application "with that authority previously granted" (J.S. App. 32). The district court construed this phrase as containing a self-imposed restriction that appellant would not tack the requested authority with any authority acquired after the *filing* of the application (J.S. App. 36).[2] Under this interpretation, the district court concluded that "[p]laintiffs and any other interested parties were entitled to rely on the representations contained in the application" (J.S. App. 37). It therefore held that insofar as the Commission's order authorized a tacking of this authority with the authority acquired after the filing, but prior to the grant, of this application, it authorized an operation not covered by the application and must be set aside.

We believe that the district court's reading of appellant's application is unduly restrictive. Properly interpreted, the application states appellant's intention to tack the instant authority with all authority that might be granted to it prior to a final ruling on this application. Subsequent publication of notice of its intention to purchase the operating rights of Alabama Highway Express warned competing carriers of appellant's intention to combine that authority with the rest of its route structure.[3]

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[2]The Commission recently has adopted new rules governing the right of irregular-route carriers to tack their separately granted authorities. See *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed by this Court, No. 75-414, January 12, 1976. However, that change of policy does not affect the right of carriers to combine authority under the regular-route certificates involved in this litigation.

[3]After the acquisition, all pleadings filed in this proceeding expressly stated that intention (Pet. 13).

The competitor's objections therefore should have been raised in the proceeding in which appellant purchased that authority.

We do not believe, however, that plenary review is warranted in order to determine the correctness of the district court's interpretation of the meaning of one phrase in a particular route authorization application. Moreover, the district court's decision does not irrevocably deprive appellant of the opportunity to obtain the right to tack the authorities in question. If it elects to do so, appellant may file an application for that authority under Section 207 of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. 307, and, if appropriate, an application for temporary authority under Section 210a (a), 52 Stat. 1238, as amended, 49 U.S.C. 310a(a).

Therefore, as to this issue as well, we suggest that plenary consideration would be inappropriate and that summary disposition would be proper.

Respectfully submitted.

ROBERT H. BORK,
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General Counsel,
Interstate Commerce Commission.

MARCH 1976.

DOJ-1976-03

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC.,
Appellant,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

RESPONSE BY APPELLEES TO MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

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vs.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

RESPONSE BY APPELLEES TO MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

Appellees submit the following response to the Memorandum For The United States And The Interstate Commerce Commission filed March 12, 1976.

Appellees agree with the Government's position that summary disposition is appropriate.

Appellees also agree with the Government's observation (p. 6) that the District Court's decision does not irrevocably deprive appellant of anything. The decision did nothing more than direct the ICC to conform its grant of authority to the appellant's application so as to authorize appellant to perform *all* motor carrier operations it proposed to conduct and *all* operations for which a public need was found to exist. If additional authority is desired, an application for temporary and permanent authority therefor may be filed by appellant at any time.

The Government's memorandum states (p. 1) that the District Court directed a modification in the ICC's order that would preclude appellant "from providing through transportation service between the geographic areas covered by the new certificate and those points it presently serves." This is not accurate. The court fully upheld the agency's authorization for appellant to provide through service between all areas covered by the new certificate and all areas served by appellant at the time it presented its application, this being the full service proposed by appellant, the full service for which supporting evidence was presented, and the full service for which a public need was found. The court directed only that the Commission delete from its grant the excess authority for which there was *no supporting evidence* and *no finding of public need*, this being authority to conduct through service between the new area embraced within appellant's application and a limited area that was being served by another carrier (Alabama Highway Express) at the time of the hearing.

The Government suggests (p. 5) that "the district court's reading of appellant's application is unduly restrictive." The court, however, found that "[t]here is

nothing ambiguous in the application or in the notice describing the proposal."[1] (J.S. App. 36). It is also suggested (p. 6) that appellees should have raised their objection to the grant of such excess authority "in the proceeding in which appellant purchased that [Alabama Highway Express] authority." As found by the District Court "[t]he contention is without merit . . ." (J.S. App. 36). Appellees had no standing in that proceeding since they had and now have no objection to anything that was proposed or authorized therein.[2]

The Government states (p. 5, note 3) that after appellant purchased the Alabama Highway Express authority "all pleadings filed in this proceeding expressly stated" appellant's intention to join or tack such authority with that sought in this proceeding. This is not correct. All such pleadings reaffirmed appellant's intention to join the sought-after authority *only* with the authority that appellant held at the time of the hearing (see Appellees' Motion to Affirm, pp. 11-12).

Appellees' position concerning the scope of the District Court's review upon remand is presented on pages 15-16 of the Motion to Affirm.

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1. The Government's brief in the District Court (p. 20) admitted that the ICC improperly granted such excess authority if the applicant "indicated that it *did not intend* to tack these rights with any others to be subsequently obtained." As noted, the District Court found that the applicant had *clearly* indicated that it did not intend to do so; therefore, such excess grant was improper.

2. It is noted that one participant in the Bowman-Alabama Highway Express case sought to predicate objections upon operating rights not yet issued by the Commission. The Administrative Law Judge ruled that such contentions could not be considered. (See Report and Recommended Order, Interstate Commerce Commission Docket No. MC-F-9921, p. 7, App. 4, Brief of Plaintiffs and Intervening Plaintiff on Remand, filed in District Court June 16, 1975.)

Appellees agree with the Government that no substantial question is presented by this appeal. The judgment of the District Court should be affirmed.

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